92-No.475

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

I.M.T.C., INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the National Labor Relations Board exceed its authority in establishing bargaining units which, contrary to Board precedent, do not constitute either a craft unit or a clearly identifiable and functionally distinct group of employees?

2. Did the National Labor Relations Board exceed its authority in making bargaining unit determinations which require fragmented collective bargaining along craft lines by a construction industry employer who has heretofore operated with an integrated work force and without formal craft distinctions?

RULE 14.1(a) STATEMENT

Parties to the proceeding in the court whose judgment is sought to be reviewed are:

I.M.T.C., Inc. (has no parent or subsidiary companies)

National Labor Relations Board

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ORDERS AND OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, which is unreported, appears in (Appendix A). The relevant orders of the National Labor Relations Board issued in this case, unreported, are the Decision and Direction of Election (Appendix B), Order Denying Employer's Request for Review of the Regional Director's Decision and Direction of Election (Appendix C), Hearing Officer's Report on Determinative Challenged Ballots and Objection to Conduct of Election (Appendix D), Decision and Certification of Representative (Appendix E), and Decision and Order granting General Counsel's Motion for Summary Judgment (Appendix F).

JURISDICTION

The Fifth Circuit Court of Appeals entered its opinion and judgment on December 10, 1992. Petitioner files this Petition for Writ of Certiorari within 90 days of the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 9(b) of the Labor Management Relations Act of 1947, 29 U.S.C. §159(b), provides in pertinent part:

> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

STATEMENT OF THE CASE

In this case, I.M.T.C., Inc. (IMTC), a construction contractor, is contesting an order issued by the National Labor Relations Board (NLRB or Board), directing IMTC to engage in fragmented collective bargaining with two different labor unions which are seeking to represent subgroups of employees carved from an integrated work force.

IMTC is a general contractor which employed a fluctuating work force averaging approximately 230 employees during the relevant period. All nonsupervisory construction employees of IMTC are classified as either Mechanic "A" (highest skill level), Mechanic "B"

(somewhat less skilled), Helper "I" (unskilled assistance to mechanics), Helper "II" (unskilled assistance to mechanics), or Laborer (incidental unskilled work). Work crews usually consist of three to six employees from one or more of these classifications, working side-by-side and supervised by the same lead foremen. While crew members are generally assigned work so as to best utilize their particular skills,[1] all crew members are expected and do whatever work is required to successfully complete an assigned project. Thus, employees are not assigned work strictly along craft lines, and utilization of multiple skills and performance of overlapping job tasks by crew members occurs on a routine basis.

All employees within each classification receive the same pay and same benefits without regard to their particular dominant skill, and all members of each crew have the same lunch period and attend weekly "toolbox" safety meetings. The employees' orientation, personnel policy guide, and anti-drug policy apply equally to all employees. All employees are encouraged to attend cross-skill training programs for the purpose of broadening their abilities in varied skills, thereby making them more valuable in the composite crew.

Against this background of composite crews and undifferentiated mechanics and helpers, two labor unions filed petitions with the Board seeking to be certified as separate representatives of certain subgroups of employees who worked within IMTC's construction crews. Specifically, the Plumbers and Steamfitters Local 106, a/w United Industry of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada

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[1] The various skills utilized by IMTC include pipefitting, boilermaking, ironwork, driving, operating, millwright, carpentry, pipe welding, and roofing.

(Plumbers Local 106) sought to represent approximately 50 employees described as "pipefitters, pipe welders, and pipe helpers," and the International Union of Operating Engineers, Local 406, AFL-CIO (Operating Engineers Local 406) sought to represent approximately 12 employees described as "operating engineers." IMTC contended that the only unit appropriate for bargaining is an overall unit consisting of all construction workers employed by the Company.

Following a hearing, the Board's Region 15 Director issued a Decision and Direction of Election on January 12, 1990, ordering two elections in two separate units consisting essentially of the subgroups which had been requested by the unions (Appendix B). IMTC filed a Request for Review which was denied by the Board (Appendix C), and elections were held in the two separate voting units. A sufficient number of ballots were challenged to effect the results in each election. Both IMTC and the Plumbers Local 106 filed objections to the conduct of the election, with IMTC again asserting, among other things, that the bargaining units had been improperly constituted.

Following a hearing on the challenged ballots and objections, the Hearing Officer issued a Report on Challenged Ballots and Objections (Appendix D) in which IMTC's objections to the elections were overruled, and rulings were made on various challenged ballots. IMTC filed exceptions to the Report with the Board, which were denied. Accordingly, on February 20, 1991, based upon a majority of votes counted having been cast for the unions in each unit, the Board certified the Plumbers Local 106 and the Operating Engineers Local 406 as the exclusive collective bargaining representatives of each respective subgroup of employees (Appendix E).

Thereafter, IMTC refused to bargain with either of the unions in order to challenge the appropriateness of the bargaining units certified by the Board. Upon the filing of an unfair labor practice charge by the unions, the Board's General Counsel issued a complaint, and the Board subsequently granted General Counsel's Motion for Summary Judgment on June 11, 1991, finding an unlawful refusal to bargain on the part of IMTC (Appendix F). IMTC thereafter appealed to the Fifth Circuit Court of Appeals pursuant to 29 U.S.C. §160(f), asking that the Board's bargaining unit determinations and ruling on objections be reviewed, and that the Board's order requiring IMTC to bargain with the unions be set aside. The Board cross-petitioned for enforcement of its order. The Fifth Circuit denied IMTC's Petition for Review, and granted the Board's Petition for Enforcement of its order on December 10, 1992 (Appendix A).

Petitioner IMTC respectfully suggests that this case raises an important question concerning the propriety of the Board's decision to require fragmented collective bargaining along traditional craft lines by a construction industry employer who has heretofore successfully operated with an integrated work force and without formal craft distinctions.

REASONS FOR GRANTING THE WRIT

I. The NLRB's Bargaining Unit Determinations, As Enforced By The Court of Appeals, Seriously Deviated From Board Precedent.

The Board has long held that construction industry bargaining units may be appropriate on the basis of "craft," or on the basis of a unit which constitutes "a clearly identifiable and functionally distinct group of

employees." *Longcrier Company,* 277 NLRB 570 (1985); *Atlantia Division of S. J. Groves and Sons Company,* 267 NLRB 175 (1983); *Brown & Root, Inc.,* 258 NLRB 1002 (1981). Here, the Board found that the respective subgroups of employees constituted appropriate craft units. (Decision and Direction of Election, Appendix B, p. B-9.) IMTC respectfully submits, however, that the bargaining units certified by the Board do not meet the Board's traditionally applied criteria for a craft unit. Furthermore, the traditional criteria for a "clearly identifiable and functionally distinct group of employees" are likewise not present in this case.

A. Craft Unit

Under Board precedent, it is not sufficient for the recognition of a craft unit that a group of skilled employees simply spend a majority of their time performing their dominant skill. *Longcrier Company, supra* at 572. Rather, the Board has heretofore required that craft units satisfy certain criteria, including: (a) existence of an apprenticeship program; (b) existence of journeymen certification requirements; (c) utilization of helpers who are part of an apprenticeship program; (d) assignment of work in accordance with strict jurisdictional or craft lines; and (e) separate craft supervision. In the instant case, however, *not a single one of these criteria is present.*

1. *Apprenticeship requirement.* The existence of an apprenticeship program has been a core requirement for craft units found appropriate by the Board. *See, Longcrier Company, supra; Proctor and Gamble Paper Products Company,* 251 NLRB 492 (1980); *Denver Heating, Piping and Air Condition Contractors,* 99 NLRB 251 (1952). IMTC has no apprenticeship program and provides no on-the-job craft training. (See Decision and Direction of Election, Appendix A, p. B-7). Moreover, upgrade training made available

through a builder's association is voluntary and can be utilized by employees to cross-train into other skill areas. Such voluntary cross-training of employees has been found by the Board to militate against the existence of a craft unit. *See, Brown & Root, supra* at 1003; *Proctor and Gamble, supra* at 493.

2. *Journeymen certification requirement.* In the absence of journeyman status or certification, the Board has traditionally refused to find a craft unit. *See, Longcrier Company., supra; Brown & Root, Inc., supra; Proctor and Gamble Paper Products Co., supra; Pervel Industries, Inc.*, 163 NLRB 1037 (1967); *Erie Marine Division*, 195 NLRB 815 (1972). Here, the Board found a craft unit despite the fact that IMTC has no journeyman certification or license requirement for the employees it hires.

3. *Helper apprenticeship program.* The Board has declined to include helpers in a craft unit where the helpers are not part of an apprenticeship program. *See, Brown & Root, Inc., supra.* Deviating from this precedent, however, the Board included pipe helpers in the unit of "pipefitters, pipe welders, and pipe helpers," even though there was no evidence that any helper is in any apprenticeship program.

4. *Craft assignment.* In order to find a craft unit, the Board has required that work assignments be made following strict jurisdictional or craft lines. *See, Brown & Root, Inc., supra.* Here, the record is replete with evidence that work assignments are not made along strict jurisdictional or craft lines. While employees obviously are predominantly assigned to those tasks for which they are most skilled to perform, employees regularly perform work outside their dominant skill. A number of employees perform a *substantial* amount of work outside their dominant skill. (E.g., W. R. Burns, 70% operating, 30% pipefitting; J. R. Citizen, 50% operating, 30-40% pipefitting; B. R.

Demeritt, 40% pipefitting, 40% operating; J. C. Matney, 50% pipefitting, 50% operating; R. Livingston, 60% mechanic, 40% operating). See Appendix D, pp. D-7, D-8, D-9, D-22. Again, the Board's finding of a craft unit even though employees are not assigned along strict craft lines is a marked departure from past precedent.

5. *Supervision.* Finally, the Board has routinely limited craft unit determinations to cases where craftsmen have separate craft supervision. *See, A. C. Pavement Stripping Co.*, 296 NLRB 206, 209 (1991); *ECM, Inc.*, 264 NLRB 1077 (1982); *Dow Chemical Co., Rocky Flats Division*, 202 NLRB 17 (1973); *E. I. Dupont deNemours and Co.*, 162 NLRB 413, 418 (1966). Here, IMTC does not have separate supervision for employees performing either operating or pipefitting work, but rather maintains composite cross-craft crews in which all employees in the crew, regardless of their dominant skill, are supervised by a common supervisor.

Thus, it is clear from the record that the crucial factors which the Board has required in order for a craft unit to be found appropriate are not present in the instant case. The Board's unit determination in this case simply *cannot* be reconciled with its prior decisions regarding craft units. Accordingly, the Board's order represents an insufficiently explained deviation from Board precedent.

B. Functionally Distinct Group of Employees

The Board's order reflects an intent to establish a craft unit. (See Decision and Direction of Election, Appendix B, p. B-9.) As discussed above, the Board's "craft unit" determination is in serious conflict with prior Board decisions. An alternative basis upon which the Board could have made the unit determination (but did not) would have

been on the basis of whether there exists a "clearly identifiable and functionally distinct group of employees." *See, Atlanta Division of S. J. Graves and Sons company, supra; Brown & Root, Inc., supra.* The record facts, however, cannot support a unit determination on this basis, either.[2]

Even though IMTC undisputedly employs many employees with identifiable dominant skills, virtually every other factor which the Board has relied on in the past to support a finding of "clearly identifiable and functionally distinct group of employees" is absent here. There are no separate job classifications or payroll designations by craft or dominant skill. There is no separate department or other unit organized by craft or dominant skill. There is no separate supervision for any particular craft or dominant skill group. There are no craft-specific work teams, inasmuch as all work teams are constituted along cross-craft lines. There is no geographic separation among employees in the various dominant skill groups. There are no differences in the wages received by employees in the various dominant skill groups. There are no differences in benefits received by employees in the various dominant skill groups. There is no difference in the hours worked and the facilities used by employees in the various dominant skill groups. There is no difference in the labor relations policies applied to the various dominant skill groups. There are no differences in the terms and conditions of employment applied to the various dominant skill groups. And finally, there is considerable functional integration of the work performed by the various skill groups, as well as varying degrees of overlapping duties. Under these circumstances, the Board has in the past refused to carve out units for

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[2] The Court of Appeals did not specifically articulate whether it was affirming the Board's decision on the basis of "craft unit" or "clearly identifiable and functionally distinct group of employees."

which, as here, the only common characteristic of the group is the fact that the employees in the requested unit "happen to spend a majority of their time" performing similar skills. *See, Longcrier Company, supra; Atlanta Division of S. J. Groves and Sons Co., supra; Brown & Root, Inc., supra.*

IMTC is mindful that the NLRB has considerable latitude in making bargaining unit determinations, and that the NLRB's judgment should be disturbed by the courts only where its unit determinations are arbitrary or unsupported by substantial evidence. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 83 L. Ed 2d 986, 105 S. Ct. 984 (1985); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491, 91 L. Ed 1040, S. Ct. (1947). However, IMTC respectfully urges that the Board's failure to adhere in this case to the principles which it has heretofore followed reflects arbitrariness and a lack of substantial supporting evidence. Alternatively, at the very least, the Board has failed to provide "articulated reasons" for the distinctions between this case and the virtually indistinguishable cases in which the Board has ruled to the contrary. *See, NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-43, 13 L. Ed 2d 951, 85 S. Ct. 1061 (1965).

II. The NLRB's Decision To Carve Out Separate Craft Units From A Homogeneous And Functionally Integrated Workforce Undermines, Rather Than Fosters, Federal Labor Policy.

One of the overriding purposes of the National Labor Relations Act is to foster industrial peace and the stabilization of labor relations in the workplace. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794, 108 L. Ed. 2d 801, 110 S. Ct. 1542 (1990); *Brooks v. NLRB*, 348 U.S. 96, 99 L. Ed. 125, 75 S. Ct. 2225 (1954). IMTC respectfully urges that the Board's deviation from its past precedent in

this case, and the precedent which this deviation establishes, does not foster, but rather undermines, stable labor relations.

Viewed from a workplace standpoint, the NLRB's separate certifications of operators and pipefitters/pipewelders — apart from other employees with similar skills, common supervision, identical working conditions, and common economic interests — will likely generate factionalism, resentment, and dispute where none presently exist. *See, Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining*, p. 69. This type of potentially disruptive environment is inevitable where, as here, small functionally integrated work crews will be comprised of both union and non-union employees on the same job. Moreover, employees working side-by-side with each other will potentially be subject to different wages, different benefits and different work rules. It is difficult to imagine conditions which could be less conducive to team work, cooperation, good employee morale, and industrial peace.

Furthermore, from a collective bargaining standpoint, other difficulties will necessarily flow from these carved out units. Given that a number of IMTC's employees perform various cross-craft skills, there will inevitably be disputes simply attempting to identify which employees are included in which unit, and which employees are in no unit at all.[3] Similarly, jurisdictional issues are likely to be raised by the representative unions which would be nonexistent in a company-wide unit. Likewise,

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[3] In this connection, approximately 30 of the individuals voting in the elections were challenged due to dispute among the parties as to which unit, if any, those individuals properly belonged. *See* Hearing Officer's Report on Determinative Challenged Ballots and Objections to Conduct of Election, Appendix D.

supervisors and foremen will be called upon the administer and comply with multiple collective bargaining agreements covering employees working side by side. IMTC submits that such potential issues and problems would largely be obviated, and union-management relations could proceed with much greater stability, if the appropriate unit was constituted in accordance with the principles the Board has adhered to in the past. *See, Brown & Root, Inc., supra.* Moreover, not only does the Board's decision in this case adversely impact Petitioner's business, it creates precedent which will have far ranging disruptive consequences for the construction industry as a whole.

CONCLUSION

The NLRB's unit determinations in this case, as enforced by the Court of Appeals, constitute a significant and unexplained departure from prior decisions and policies. Moreover, the decision of the NLRB to carve out separate craft units from a homogeneous and functionally integrated work force undermines, rather than fosters, stable labor relations.

For these reasons, this case merits review of the Court.

Respectfully submitted this ____ day of March, 1993.

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CERTIFICATE

I hereby certify that I have this ____ day of March, 1993, caused to be served, three (3) copies of the above and foregoing Petition for Writ of Certiorari and Appendix by United States mail, postage prepaid, upon all parties required to be served. Service has been made upon the following:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4594
Summary Calendar

FILED
DEC 10 1992

I. M. T. C., INC.,

Petitioner,
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner.

Petition for Review and Cross-petition for enforcement of an order of the National Labor Relations Board

(NLRB #15-CA-11472)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit Judges.

POLITZ, Chief Judge:*

I.M.T.C., Inc. petitions under 29 U.S.C. § 160, asking

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

that we review and set aside a National Labor Relations Board order requiring IMTC to bargain with unions certified to represent two groups of its employees. The NLRB seeks enforcement of its order. Finding no basis to reject the NLRB order, we deny review and grant enforcement.

Background

IMTC conducts a general industrial construction business in the Lake Charles, Louisiana area. In December, 1989, two unions[1] filed petitions seeking to represent units of IMTC's pipefitters (Unit A) and operating engineers (Unit B). After a consolidated proceeding before an NLRB hearing officer, the NLRB Regional Director found certification of the two separate bargaining units among the IMTC employees appropriate,[2] rejecting IMTC's contention that its employees properly comprised a single unit, and directed a representation election. The NLRB denied IMTC's request for review of the Regional Director's decision.

On February 8, 1990, in a secret ballot election, Unit A approved union representation by a 55-30 margin and Unit B approved union representation by an 8-2 margin.

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[1] Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada ("Local 106") and International Union of Operating Engineers Local 406, AFL-CIO ("Local 406").

[2] The Regional Director identified Unit A as "[a]ll pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined by the Act." The Regional Director defined Unit B as "[a]ll operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act."

The NLRB agent supervising the election, the unions, and IMTC challenged a total of 52 ballots in the Unit A election and 13 ballots in the Unit B election.[3] In addition, IMTC renewed its objection to designation of separate bargaining units and both IMTC and the unions filed objections to the conduct of the election. After a hearing ordered by the Regional Director, a hearing officer recommended opening and counting nine of the challenged ballots in Unit A and three Unit B challenged ballots,[4] and overruled IMTC's other objections. IMTC filed objections to the hearing officer's recommendations, and the Regional Director transferred the matter to the NLRB. The NLRB adopted substantially all of the hearing officer's recommendations,[5] and certified Local 106 and Local 406 as the exclusive collective bargaining representatives of Units A and B, respectively.

After the NLRB certification order, IMTC refused to bargain with either union. In response to this conduct, the Regional Director, on March 22, 1991, issued a complaint against IMTC, alleging unfair labor practices in violation of National Labor Relations Act sections 8(a)(1) and (5).

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[3] Election results do not include challenged ballots unless and until the NLRB finds those challenges without merit. Even where such challenges fail, the NLRB does not count challenged votes unless they may alter the outcome of a representation election. See Robert A. Gorman, Basic Text on Labor Law 47 (1976).

[4] The hearing officer recommended acceptance of stipulations that ineligible employees cast 17 of the challenged ballots in Unit A and one challenged ballot in Unit B, and that an eligible employee cast one of the challenged ballots in Unit B. The hearing officer also recommended sustaining challenges to 26 ballots in Unit A and 9 ballots in Unit B.

[5] After adopting the hearing officer's recommendations as to 31 Unit A ballot challenges and 7 Unit B ballot challenges, the NLRB found that two remaining challenges in each unit no longer could affect election outcomes, and therefore declined to reach them.

The NLRB General counsel moved for transfer of the case to the Board, and for summary judgment. On May 15, 1991, the Board transferred the case to itself, and issued IMTC a notice to show cause why summary judgment should not be granted. The Board, finding that with respect to representation IMTC failed to raise any issue not already litigated or to present any evidence warranting reexamination of prior decisions, granted summary judgment against IMTC, ordering it to bargain with the unions and to post an appropriate notice. IMTC and the NLRB then filed the instant petitions for review and enforcement.

Analysis

In its petition, IMTC once again claims error in the NLRB's bargaining unit determination. In the alternative, IMTC raises two challenges to the representation election. First, IMTC claims that the Board ruled erroneously on ballot challenges in both units. IMTC then asserts that the NLRB erred in finding election day campaigning by Local 106 unobjectionable. We address each of these contentions in turn.

A. *NLRB Unit Determination*

IMTC vigorously maintains that the NLRB should have designated a single bargaining unit including all of its employees. IMTC argues that because its employees routinely "cross craft lines," working side-by-side under similar conditions, its work force does not divide neatly into craft units. IMTC further argues that by certifying multiple craft units in the instant case, the Board deviated without explanation from its own precedents.

As we have long recognized, we conduct an "exceedingly narrow" review of NLRB bargaining unit

determinations, recognizing that such actions involve a large measure of informed discretion "rarely to be disturbed."[6] We will upset a unit determination only where we find it "arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support."[7] The Board need only select *an* appropriate unit, rather than the *most* appropriate unit,[8] and the challenging employer must demonstrate that the Board made a clearly inappropriate selection.[9]

The Board utilizes a "community of interests" test in arriving at unit determinations under section 9(b) of the Act. This test directs the Board's attention to numerous criteria including "bargaining history, operational integration, geographic proximity, common supervisor, similarity in job function, and employee interchange."[10] We have noted that similarity of work, skills, qualifications, duties and working conditions most reliably indicate community

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[6] N.L.R.B. v. Action Automotive, Inc., 469 U.S. 490 (1985) (citing Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491 (1947)); Electronic Data Sys. Corp. v. N.L.R.B., 938 F.2d 570, 572-73 (5th Cir. 1991) (citation omitted).

[7] E.g., N.L.R.B. v. J. C. Penney Co., Inc., 559 F.2d 373, 375 (5th Cir. 1977) (citations omitted).

[8] E.g., American Hosp. Ass'n v. N.L.R.B., ___ U.S. ___, 111 S. Ct. 1539, 113 L. Ed. 2d 675 (1991); N.L.R.B. v. Purnell's Pride, Inc., 609 F.2d 1153 (5th Cir. 1980).

[9] See, e.g., J.C. Penney, 559 F.2d at 375.

[10] See Electronic Data Sys. Corp., 938 F.2d at 573 (citations omitted). The Board formulated "community of interests" analysis to prevent designation of bargaining units so large as to represent conflicting employee interests or so small as to lack effective bargaining power. See Robert A. Gorman, Basic Text on Labor Law 68-69 (1976).

of interests.[11] The Board's discretion, however, "is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors."[12] As the Board has long recognized, employee groups defined by commonality of craft skills or function often comprise appropriate bargaining units in the context of the construction industry.[13]

IMTC's employees work identical hours, receive identical benefits, and share common parking and tool room facilities. Further, IMTC deploys its workforce in crews containing members of varied expertise, and foremen at each work site oversee workers of all crafts. All employees attend regular safety meetings on a site-by-site basis. In addition the company, through an arrangement with the Associated Builders & Contractors, provides training so that interested employees can learn new crafts. IMTC and the Board, however, part company over the role which craft lines play in the IMTC organization.

IMTC insists that its workforce does not divide neatly along craft lines. The company notes that, for payroll and record-keeping purposes, it formally classifies employees generically rather than by craft.[14] Further, it claims that all employees routinely perform any tasks

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[11] See N.L.R.B. v. DMR Corp., 795 F.2d 472, 475 (5th Cir. 1986) (citing Allied Chemical Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co. v. N.L.R.B., 404 U.S. 157 (1971)).

[12] Id. (citation omitted).

[13] See, e.g., N.L.R.B. v. Crockett-Bradley, Inc., 523 F.2d 449 (5th Cir. 1975); Longcrier Co., 277 N.L.R.B. 570 (1985).

[14] For most purposes, including wage determination, IMTC classifies its employees as "Mechanic A," "Mechanic B," "Helper 1," "Helper 2," or "Laborer."

necessary to completion of a project, regardless of their principal areas of expertise.

The Board claims that IMTC employees work primarily at their dominant skills. Conceding that workers sometimes perform tasks outside the strict definitions of their crafts, the Board argues that these deviations do not involve journeyman-level work in other crafts and consist primarily of tasks incidental to their dominant skills. The Board further points out that IMTC requires its employees to identify a "dominant skill' at the time of hiring, and to provide tools necessary for that craft. Finally, the board points out that IMTC "catalogues" its employees according to their dominant skills, and uses this information in making decisions about recall of laid-off employees.

The record in this case presents conflicting evidence. Where substantial evidence in the record as a whole supports the Board's findings, we must uphold the Board even though our *de novo* consideration might yield a different result.[15] We find record support here for the Board's finding that the IMTC workforce includes distinct craft groups. Accepting, as we must, the Board's findings of fact, and mindful of the Board's longstanding recognition that special circumstances in the construction industry often militate in favor of craft-based bargaining units, we cannot conclude that the unit determination in this case is arbitrary or capricious. The fact that IMTC employees occasionally work outside of their primary craft does not alter this conclusion.[16] Although IMTC may have proposed an

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[15] See 29 U.S.C. §§ 160(e), (f) (Board findings with respect to questions of fact conclusive if supported by substantial evidence on the record considered as a whole); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951).

[16] See N.L.R.B. v. Crockett-Bradley, Inc., 523 F.2d 449 (5th Cir. 1975)

appropriate unit, it has failed to show that the Board designated clearly inappropriate units.[17]

B. *Resolution of Ballot Challenges*

IMTC also assigns as error the Board's resolution of challenges to 24 employee ballots. The company claims that the Board incorrectly concluded that the duties of 22 employees placed them outside of Unit A. Similarly, IMTC claims that the Board erroneously sustained challenges to ballots by three employees in Unit B.[18]

In raising this issue, IMTC in essence asks us to review NLRB determinations whether the employees casting challenged ballots share the community of interests defining the unit in which IMTC seeks to include

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(footnote 16 continued)

(in construction industry, separate bargaining unit of truck drivers appropriate although drivers in question also performed occasional construction work); Dick Kelchner Excavating Co., 236 N.L.R.B. 1414 (1978).

[17] We find no merit in IMTC's suggestion that the Board's order in this case represents an insufficiently explained deviation from precedent set in A.C. Pavement Stripping Co., 296 N.L.R.B. No. 38 (1989); Longcrier Co., 277 N.L.R.B. 570 (1985); Atlanta Div. of S.J. Groves & Sons Co., 267 N.L.R.B. 175 (1983); and Brown & Root, Inc., 258 N.L.R.B. 1002 (1981). The instant case is factually distinguishable from those cited by IMTC.

[18] The Board incorrectly suggests that we need consider none of the ballot challenges because even if we resolve them all favorably to IMTC, the election results will not change. No party disputes the Board's finding that three challenged ballots in Unit B and nine in Unit A should be counted. Considering these as yet uncounted ballots, Local 106 could have prevailed in Unit A by as few as 16 votes and Local 406 by as few as three votes in Unit B. Thus, our resolution of these challenges could affect the election results.

them.[19] The substantial discretion which the Board enjoys when answering the community of interests question in the context of unit determinations is akin to that it enjoys when determining the unit membership of individual employees. We will not upset such individual determinations where there exists in the record substantial supporting evidence.[20]

Board opinions considering craft unit membership of individual employees have focused on the extent to which craft-related activities predominate among the duties of the employee in question.[21] In addition, the Board has looked to other community of interests factors in determining the unit membership of individual employees.[22]

In the instant case, the Board sustained challenges to ballots of 19 employees in Unit A, based on findings that these employees were predominantly skilled at carpentry and spent the lion's share of their time performing carpentry work. The Board further sustained challenges to the ballots of employee A. J. Reeves in both Unit A and Unit B, finding that although Reeves was primarily skilled as a pipefitter he spend the bulk of his time working as an expediter — a job classification which the parties agree does not fall within either unit. Our review of the record indicates that substantial evidence in the record supports

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[19] See Dick Kelchner Excavating Co., 236 N.L.R.B. 1414 (1978) (employee excluded from unit lacked interests in common with other members).

[20] Cf. N.L.R.B. v. Dickerson-Chapman, Inc., 964 F.2d 493 (5th Cir. 1992) (Board determination as to employee's supervisory status upset only if not supported by substantial evidence in record).

[21] See W. P. Butler Co., 214 N.L.R.B. 1039 (1974).

[22] See Dick Kelchner Excavating Co., 236 N.L.R.B. 1414 (1978).

these findings, and we decline to upset them.[23]

C. *Conduct of the Election*

IMTC finally contends that improper election day campaigning staged by representatives of Local 106 requires invalidation of the election. The Board adopted the hearing officer's finding that Local 106 engaged in no objectionable activity. The NLRB prohibits campaigning at or near the polls in order to prevent interference with employee exercise of free choice in representation elections.[24] Objectionable activity vitiates an election only if "when considered as a whole, [it] either tended to or did influence the outcome of the election." We have long recognized the NLRB's broad discretion in determining whether misconduct tainted an election, and will disturb a Board resolution of that issue only if no substantial evidence in the record supports it.[25]

In this case, no party contends that representatives of Local 106 did anything other than carry and post signs at the side of the road leading to the polling place. Further, IMTC concedes that this activity did not take place closer than one-third of a mile from the polling place. The record reflects that this activity took place along one of several routes to the polling place, and violated no instruction of the supervising Board Agent. There is no record evidence that this activity involved direct contact with people

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[23] Because we have found adequate support for the Board's decision to exclude 20 of the challenged ballots in Unit A and one challenged ballot in Unit B, resolution of the remaining challenges to two ballots in Unit A and two ballots in Unit B cannot affect the election results. We therefore decline to consider these remaining challenges.

[24] *See* Claussen Baking Co., 134 N.L.R.B. 111 (1961).

[25] N.L.R.B. v. Golden Age Beverage Co., 415 F.2d 26 (5th Cir. 1969).

enroute to the polls or in line waiting to vote or that IMTC complained at the time of the election to the supervising Board Agent. We conclude that the record supports the Board's ruling that this activity imposed no objectionable influence on the election.[26]

Conclusion

For the foregoing reasons, we DENY the petition for review and GRANT the NLRB's petition for enforcement of its order.

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[26] *See* Boston Insulated Wire & Cable Sys., Inc. v. N.L.R.B., 703 F.2d 876 (5th Cir. 1983) (electioneering activity just outside polling place entrance did not require NLRB to set aside election where closed doors separated campaigners from employees waiting in line to cast their ballots and campaigners had no conversations with such employees).

APPENDIX B

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION 15

I. M. T. C., INC.	*	
	*	
Employer	*	
	*	
and	*	Case No.
	*	15-RC-7492
	*	
PLUMBERS AND STEAMFITTERS LOCAL 106, A/W UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF NORTH AMERICA AND CANADA	*	
	*	
Petitioner	*	
	*	
and	*	
	*	
I. M. T. C., INC.	*	
	*	
Employer	*	
	*	
and	*	Case No.
	*	15-RC-7497
	*	
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406, AFL-CIO	*	
	*	
Petitioner	*	
	*	
* * * * * * * * * * * * * * * * * *	*	

DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. At the hearing in this matter, the Petitioner Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada (herein called the "Petitioner Plumbers") sought to represent a unit of approximately 50 pipefitters, pipe welders, pipe helpers, and sketchmen employed by the Employer at all

of its jobsites in the area in and around Lake Charles, Louisiana. The Petitioner International Union of Operating Engineers Local 406, AFL-CIO (herein called the "Petitioner Operating Engineers") sought to represent a unit limited to the approximately 12 operating engineers employed by the Employer at all of its jobsites in the area in and around Lake Charles, Louisiana. The Employer contends that the only appropriate unit is one consisting of all of its mechanics, laborers, helpers, sketchmen, tool room attendants and pipeline helpers employed at all of the various jobsites. Alternatively, in the event that the petitioned-for units were found inappropriate, both of the Petitioners sought to jointly represent all of the employees in the larger appropriate unit. There is no history of collective-bargaining concerning any of the employees involved herein.[1]

The Employer, a Louisiana corporation, is engaged as an industrial general contractor and provides both mechanical and civil contracting services on jobs ranging in value from $2,000 to $3 million. In and around Lake Charles, Louisiana, the Employer has contracts with Conoco in Westlake, Firestone in Sulphur, Olin Chemicals in Westlake, PPG in Westlake, Colonial Pipeline in Sulphur, Vista Chemicals in Lake Charles, NL Industries in Lake Charles, and Shell Pipeline between Orange, Texas

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[1] The Petitioners contend that the Employer is an off-shoot of Industrial Construction Company ("ICC"), although not a legal successor. They contend that the Employer and ICC have in common a principal stockholder and that the Employer has perpetuated certain practices of ICC (which had at one time been a "union" contractor) regarding employees functioning along craft lines, and that these practices are relevant to the instant matter. However, considering the fact that the Employer has operated since 1983 without a union contract, it is the Employer's practices during this period which are the most relevant in determining the issues presented herein. No former practices of ICC are useful for consideration except to illustrate the Employer's practices in their current context.

and New Orleans, Louisiana. In its mechanical contracting the Employer erects steel, fabricates and erects pipe, installs and sets equipment, and erects metal and steel buildings and structures. Its civil contracting involves excavating, pouring foundations, and the installation of rebar, sewers, underground pipe and underground utilities. In performing these functions at the various jobsites, the Employer currently employs approximately 185 employees. The record indicates that, while the actual number of the Employer's work force fluctuates, the average number of employees employed during the last quarter of 1989 was about 230 employees.

According to Stan Hegener, the Employer's president, the Employer classifies its employees only as Mechanic A, Mechanic B, Helper 1, Helper 2, or Laborer, without regard to traditional craft designations. However, according to Hegener's testimony and the record as a whole, it is clear that the employees at the Conoco facility are classified as pipefitters, boilermakers, operators, carpenters, and the like, because of a requirement by Conoco management for this type of classification. The record does not indicate what portion of the Employer's work force is employed at Conoco. Generally, however, rather than classifying its employees according to traditional craft lines, Hegener testified that the Employer "catalogs" employees according to their dominant skill. When employees are hired, or prior to that time, they must fill out an application form which asks them to list their dominant skill. This information is maintained by the Employer in the form of a master list of employees, which reflects the dominant skill of each employee in the form of a particular craft designation. Hegener testified that the Employer uses this list to recall employees who have been laid off.

Larry Williams, the Employer's Construction

Manager, is responsible for the overall daily operation of the Employer's jobsites. Reporting to him are approximately 9 superintendents and assistant superintendents who have direct responsibility for the operations at various jobsites. Beneath each of these levels in the supervisory hierarchy are an unspecified number of senior foremen, and lead foremen who are all assigned to direct the work force at specified areas within the particular jobsites. The Employer maintains a central, main office at Westlake, Louisiana, where its personnel, payroll, clerical and administrative functions are performed. The work force is supervised through a series of smaller offices located at the various jobsites. These offices range in size from a building at Conoco to a pickup truck at the smaller sites.

Because the Employer's jobsites are spread out over a fairly wide area, the employees generally report directly to the refinery or plant where they are assigned, although some may ride on trucks together from the parking lots to the actual work area. Since employees are often shifted on a project-to-project basis, they are not generally under the continuous direction of any one foreman or superintendent.

Hegener testified that, although employees are cataloged by craft designations, the crews are all multi-craft in nature and employees are expected to do whatever is necessary in order to complete a project. He did concede, however, that employees worked at their dominant skills whenever such work was available. In this regard, two of the Employer's former lead foremen, Russel Ross and James Taylor, corroborated Hegener's testimony and took it a step further. Ross testified that, although the Employer's crews are "mixed" in the sense that employees with varying craft skills may report to a common supervisor, the actual work is performed along craft lines. He stated that there was no cross-craft overlapping and that

there was enough work to be done so that no one had to work outside his dominant skill craft. Ross noted that while working with his tools, he was assigned only pipefitting work, which was his craft skill.

Taylor also indicated that the Employer's crews worked consistently along craft lines. He testified that no craftsmen did any work across craft lines, and that while in the capacity of a foreman, he assigned work strictly in accordance with craft jurisdiction.

While it is noted that Ross and Taylor worked at the Conoco facility, the record contains evidence which indicates that the Employer operates along craft lines at other jobsites, as well. Brady Keith Alexander is on a pipefitting/welding crew at the Employer's Firestone jobsite. He testified that, although employees from several crafts are represented, there is no crossing of craft lines, save for some occasional "trivial stuff" not normally regarded as journeyman-level craft work. Alexander did testify that employees who are pipefitters and welders regularly operated a large crane in the pipe fabrication shop. However, Vaughn Johnson, the Petitioner Plumbers' financial secretary explained that, under some of that union's "fab shop" agreements nationwide, such work is considered a secondary task to accomplish the primary task of pipe fabrication and is, thus, within the union's jurisdiction, notwithstanding the fact that it might arguably be work claimed by operating engineers.

In addition to the testimony from pipefitters, the record contains similar testimony from Donald Coffer, an operator. Coffer testified that operating engineers primarily perform what is generally considered to be operator's work. He estimated that 95% of his time was spent operating heavy equipment, with the remaining 5% spent

performing incidental work such as cranking a welding machine or picking up tools dropped by other workers. He stated that he was never asked to perform the skills of another craft and knew of no operators who were asked to do so. Like the other employees who testified, Coffer stated that there was never any mention of performing multi-craft skills at the time that he applied for employment with the Employer.

Although the Employer claims to classify employees as Mechanics, Helpers and Laborers, rather than by craft designation, it advertises and recruits strictly along traditional craft lines. It contacts the State employment office and asks for particular craftsmen, such as pipefitters, boilermakers or operators. And its newspaper advertisements are quite similar. In fact, a recent advertisment placed by the Employer specifically addresses the need for "Experienced Pipefitters and Certified Pipewelders." Further evidence of craft differentiation is found in Petitioner's Exhibit 6, a memorandum from Hegener to all current and prospective employees concerning the furnishing of certain tools. The memo categorizes employees by specific crafts and lists the tools that employees in those crafts are required to furnish.

The Employer does not provide any formal on-the-job training or apprenticeship school for its employees. Employees may qualify for added responsibility and/or wages by demonstrating increased abilities or proficiency, and the Employer also has an arrangement with the Associated Builders and Contractors ("ABC"), whereby employees can attend the ABC trade school if they want to learn a dominant skill or cross-train into other skill areas. Attendance by employees is not mandatory, and they pay their own tuition, which is later reimbursed by the Employer upon successful completion of the course. The

trade school's 1990 Spring catalog is contained in the record, and a review of it indicates that courses are offered on the basis of specific-craft skills, such as pipefitting, insulating, and boilermaking.

Virtually all of the Employer's mechanics, helpers and laborers work the same hours and enjoy the same lunch break. Those employees working at particular jobsites also share common parking and tool room facilities. Every employee hired by the Employer receives the same orientation program, and all employees attend safety meetings at their respective jobsites on a regular basis. None of the employees receives any fringe benefits, although employees can receive a one-week paid vacation for working 1800 hours or more in a calendar year.

Pay scales vary according to an employee's classification. Those classified as Mechanic "A" employees receive from twelve to thirteen dollars per hour, and welders within this classification can receive more pay than pipefitters, depending on their certification. Mechanic "B" employees are paid from ten dollars and fifty cents to eleven dollars and fifty cents an hour. The wage range for helpers is seven dollars to nine dollars and fifty cents an hour, and laborers are paid from six to seven dollars an hour. Sketchmen are paid at a rate of seventeen dollars an hour, which is the Employer's rate for senior foremen.

The record indicates several factors supporting the appropriateness of the overall unit advocated by the Employer. Pipefitters, operators, and other employees work the same hours, on the same crews, under the same supervision, and occasionally perform some of the same tasks and are subject to the same benefit policy. Other employees can become qualified to perform work along these craft lines by completing the appropriate course at

the ABC trade school and the record indicates that, in fact, several employees have done so. However, it is well established that in the construction industry, collective bargaining for groups of employees identified by functions as well as those groups identified by craft skills has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged. *R. B. Butler, Inc.*, 160 NLRB 1595 (1966); *W. P. Butler Company*, 214 NLRB 1039 (1974); *Brown & Root, Inc.*, 259 NLRB 1002 (1981). In the instant cases, the petitioned-for employees constitute separate appropriate units on the basis of craft skills. The record clearly demonstrates that the Employer maintains and organizes its employees along craft lines, notwithstanding the generic labels that it applies to the crafts. Although Hegener testified that the Employer does not follow craft lines in the assignment of work and that employees do perform work of other crafts, the record indicates that this other work to which he was referring is incidental, minor work, and is performed only when the employee has no work to do in his particular craft. Hegener conceded that employees generally perform work within their dominant skill area because that is the most efficient way for the Employer to conduct its business. The fact that some of the requested employees may occasionally perform duties not strictly within their dominant skill area, or that other employees may also perform some of these tasks, does not render the units inappropriate where, as here, the primary function of employees at all times remains the performance of duties that are traditionally recognized as being within the scope of their dominant skill craft. *Dick Kelchner Excavating Company*, 236 NLRB 1414 (1978); *Del-Mont Construction Company*,. 150 NLRB 85 (1964); *R. B. Butler, Inc.*, supra.

The Petitioner Plumbers, contrary to the Employer,

contends that the two employees classified as sketchmen at the Employer's Conoco facility should be included in an appropriate unit with the pipefitters. The Employer contends that these employees should only be included in an overall unit of employees. The two individuals in question both work at the Employer's Conoco facility. They are paid the same wages as senior foremen and spend at least 50% of their time checking the work of the crews. Both men are trained as pipefitters and approximately 99% of the work which they do is pipe-related. Although both testified that they were able to work with their tools if necessary, they conceded that they do not do so. Instead, they testified that most of their work is done using paper, pencils, levels, and tape measures. They are responsible for the testing, planning, coordinating, and designing of piping systems, and they order the materials for pipefitting systems. Although they are subject to the same benefit policy as the other employees and spend approximately half of their time in the field explaining work to the crews, the sketchmen have their own offices where they do their paperwork, both during and after normal working hours and on days when the weather prevents other employees from working. Gordon Simmons, one of the individuals in question, describes his work as that of a "field engineer." In that regard, it is noted that his training for the job consisted not only of a union apprenticeship program, but also five semesters of engineering course work at Louisiana State University.

Although it is certainly true that the sketchmen perform functions all most exclusively related to the pipefitting craft, the record indicates that their work is clearly distinct from and does not overlap with that performed by the pipefitters. The training and skills which must be and are possessed by the sketchmen set them apart from the rest of the pipefitters who may be represented in a

separate unit. Accordingly, I conclude that the two sketchmen should be excluded from the pipefitters unit found appropriate herein.

The Petitioner Plumbers contends that the Employer's tool room attendant should not be included in an appropriate pipefitters unit. Conversely, the Employer contends that this person should be included in an overall appropriate unit. The Employer maintains a tool room for all of its employees. Although one employee cataloged as a pipefitter has worked in the tool room, the record indicates that any employee, regardless of classification, can perform the tool room work. In fact, the pipefitter tool room attendant spent virtually none of his time working with the pipefitters. Joyce Reeves, a helper, replaced the pipefitter employee in the tool room, because he was laid off. Although tool room attendants are hourly paid employees, they are not readily identifiable with any particular craft. They hand out tools to employees of all crafts, not just the pipefitters. Furthermore, although the previous tool room attendant was cataloged as a pipefitter, the record indicates that his major role was to work strictly in the tool room and not perform pipefitter work. In these circumstances, it can not be determined that tool room attendants share a community of interest with any of the employees to be included in a unit found appropriate herein. Therefore, they are excluded.

Finally, the Employer contends that the pipeline helpers should be included in an overall appropriate unit, while the Petitioners contend that they are appropriately excluded from the smaller appropriate units. Hegener testified that the Employer has two helpers who work for Shell Pipeline between Lake Charles and New Orleans, and one employee who works with Colonial Pipeline at Carlyss, Louisiana. The record indicates that the pipeline employees

are helpers, hired to perform such duties as grass mowing, painting, right-of-way maintenance, fixing pipeline markers, and replacing fence posts. They work under the direct supervision of Shell and Colonial, not the Employer. Although their wages are paid by the Employer, no control over their work is retained by the Employer and they have no dominant skills and work essentially as contract labor. Accordingly, because these employees share no community of interest with the Employer's other employees, they are appropriately excluded from the units found appropriate herein.

The parties stipulated that the following job classifications should be excluded from any unit found appropriate on the basis of lack of community interest: expediting crew, office manager, scheduling estimator, purchasing agent, courier, secretary, clerical, and timekeeper. The record contains no evidence that persons working in any of these classifications should be included in an appropriate unit, and the stipulations are, therefore, accepted.

The parties also stipulated that any units found appropriate should encompass all of the various jobsites of the Employer. The record indicates that the various locations are under common ownership and supervision, they share a common main office for the processing of payroll and personnel matters, the work at the various jobsites is generally similar in nature, and the transfer of work and equipment from one jobsite to another is not uncommon. Accordingly, the stipulation as to the appropriateness of multiple-location units is accepted. *Air-Vac Industries, Inc., Leeward Construction, Inc., Air-Vac Environmental Limited*, 259 NLRB No. 51 (1982).

In view of the foregoing analysis and based on the

record as a whole, I find that the following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A

All pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

UNIT B

All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret balloting shall be conducted by the undersigned among the units found appropriate at the times and places set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. The parties have proposed, and I so find, that the formula appropriate for determining eligibility of voters in the appropriate units is as follows:

Those persons eligible to vote shall be employees who have worked at least 30 days in the six-month period immediately preceding the issuance of the decision and direction of election, excluding those persons who have quit

or been terminated for cause prior to the completion of the last job on which they worked. Those eligible to vote in Unit A shall vote whether or not they desire to be represented for collective bargaining purposes by Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada. Those eligible to vote in Unit B shall vote whether or not they desire to be represented for collective bargaining purposes by International Union of Operating Engineers Local 406, AFL-CIO.

The Petitioners have proposed, and the Employer has opposed, that as a part of the eligibility formula, those individuals with a reasonable expectation of recall should likewise be permitted to vote. The Board, in assessing a modified formula similar to the one spelled out above, determined that it amply protected the voting rights of employees who had a reasonable expectation of future employment, while at the same time not allowing those with no likelihood of future employment to decide the representation question. *Daniel Construction Company, Inc.*, 167 NLRB 1078 (1967). Therefore, the formula described above will serve to determine voter eligibility.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility

list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana 70112-3723, on or before January 19, 1990. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, DC 20570. This request must be received by the Board in Washington by January 26, 1990.

Dated at New Orleans, Louisiana, this 12th day of January 1990.

/s/ Hugh Frank Malone

Hugh Frank Malone
Regional Director, Region 15
National Labor Relations Board
1515 Poydras Street, Suite 610
New Orleans, Louisiana 70112-3723

APPENDIX C

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

FILED
FEB 12 '90

I. M. T. C., INC.
Employer

and

Case
15-RC-7492

PLUMBERS AND STEAMFITTERS
LOCAL 106, A/W UNITED
ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING
INDUSTRY OF NORTH AMERICA
AND CANADA
Petitioner

I. M. T. C., INC.
Employer

and

Case
15-RC-7497

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL
406, AFL-CIO
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.

MARY MILLET CRACRAFT, MEMBER

DENNIS M. DEVANEY, MEMBER

CLIFFORD R. OVIATT, JR., MEMBER

Dated, Washington, D. C, February 8, 1990.

APPENDIX D

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION FIFTEEN

FILED
MAY 29 '90

I. M. T. C., INC.
Employer

and

Case
15-RC-7492

PLUMBERS AND STEAMFITTERS
LOCAL 106, A/W UNITED
ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING
INDUSTRY OF NORTH AMERICA
AND CANADA
Petitioner

and

I. M. T. C., INC.
Employer

and

Case
15-RC-7497

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL
406, AFL-CIO
Petitioner

D-2

HEARING OFFICER'S REPORT ON DETERMINATIVE CHALLENGED BALLOTS AND OBJECTION TO CONDUCT OF ELECTION

Pursuant to a Decision and Direction of Election issued on January 12, 1990 by the Regional Director for Region Fifteen of the National Labor Relations Board, an election by secret ballot was conducted on February 8, 1990, among certain employees[1] of I.M.T.C., Inc. (herein called Employer) to determine whether they desired to be represented for purposes of collective bargaining, in Unit A (15-RC-7492) by Plumbers and Steamfitters Local 106, A/W United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada (herein called Local 106), and in Unit B (15-RC-7497) by International Union of Operating Engineers Local 406, AFL-CIO (herein called Local 406).

The tally of ballots served upon the parties immediately following the election in Unit A disclosed the following results:

UNIT A

Appropriate number of eligible voters	179
Void ballots	0
Votes cast for Petitioner	55
Votes cast against participating labor organization	30
Valid votes counted	85

[1] *UNIT A*

All pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Challenged ballots 52
Valid votes counted plus challenged ballots . 137

The challenged ballots were sufficient in number to affect the results of the election conducted in Unit A.

The tally of ballots served upon the parties immediately following the election in Unit B disclosed the following results:

UNIT B

Appropriate number of eligible voters 26
Void ballots 0
Votes cast for Petitioner 8
Votes cast against participating labor organization 2
Valid votes counted 10
Challenged ballots 13
Valid votes counted plus challenged ballots 23

The challenged ballots were sufficient in number to affect the results of the election conducted in Unit B.

On February 15, 1990, the Employer timely filed Objections to Conduct affecting the Results of the Election in both Unit A and Unit B, a copy of which was duly served upon Local 106 and Local 406.

On February 15, 1990, Local 106 and Local 406 time-

Unit B

All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

ly filed Objections to Conduct affecting the Results of the Election in both Unit A and Unit B, a copy of which was duly served upon the employer.

Pursuant to Section 102.69 of the Board's Rules & Regulations, Series 8, as amended, an investigation of the Determinative Challenged Ballots in Unit A and Unit B, Employer's Objections and Local 106 and Local 406 Objections was conducted under the direction and supervision of the Regional Director. On March 27, 1990, the Regional Director issued an Order Directing Hearing on Determinative Challenged Ballots and Objections to the Election and Notice of Hearing, as they raised substantial and material factual issues which could best be resolved after a hearing. It was further ordered that the Hearing Officer prepare and cause to be served upon the parties a report containing the resolution of credibility of witnesses, findings of fact and recommendation to the Regional Director as to the disposition of the issues involved therein.

The undersigned was designated as Hearing Officer and the hearing was conducted on April 16, 17, 18, 19, and 20, 1990 in Lake Charles, Louisiana. The parties to the proceeding were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and to present oral arguments. The hearing Officer did not request the parties to submit briefs as the record fully discloses the issues and their respective oral arguments. Based upon the entire record in this case, from my observation of the witnesses, after examination of all the exhibits and consideration of the arguments of the parties, the Hearing Officer makes the following findings, conclusions and recommendations:

THE DETERMINATIVE CHALLENGED BALLOTS

In Unit A, fifty two (52) employee ballots were

challenged, by the Board, Local 106 and the employer. In Unit B, thirteen (13) employee ballots were challenged by the Board, Local 406, and the Employer. In the hearing, the parties resolved seventeen (17) of the fifty-two determinative challenged ballots of Unit A. The parties additionally resolved two (2) of the thirteen (13) determinative challenged ballots of Unit B. The parties stipulated that the following employees are ineligible voters and should be excluded, that the challenge to their ballots should be sustained and the Hearing Officer so recommends to the Regional Director:

UNIT A

Phillip Broussard, Mark Khoury, Jeff Hunsecker, Aubrey Smith, J. A. Sonnier, I. T. Greene, Kirk Alexander, John Blake, David Butts, Gerald Butts, Charles Courtney, Thomas Garrison, William Hebert, Randy Smith, Billy J. Sonnier, Edgar Sonnier and Manson Pitre

UNIT B

Leroy Jackson

The parties further stipulated that employee A. Petry, an operator, is an eligible voter in Unit B and therefore, the Hearing Officer recommends to the Regional Director that his ballot should be opened and counted.

THE BOARD'S CHALLENGES UNIT A AND UNIT B

In this proceeding, as well as the prior representation proceeding, the Employer argued that the only appropriate collective bargaining unit should be a multi-craft "wall-to-wall" unit. The Regional Director in its Decision

and Direction of Election found that, although multi-craft "wall-to-wall" units are presumptively appropriate, the facts in this situation support a finding that the petitioned-for employees constitute separate appropriate collective bargaining units on the basis of *dominant craft skills.* In reaching this conclusion, the Regional Director noted that some employees may occasionally perform duties that are not strictly within their dominant craft skill. However, it was determined that this alone did not render the petitioned-for units inappropriate. In addition, the Regional Director emphasized that the Employer maintains an employee list and organizes its employees along dominant craft skills.[2] The primary function of employees at all relevant times herein remains the performance of duties that are traditionally recognized as being within the scope of their dominant craft skills. *Del-Mont Construction Company,* 150 NLRB 85 (1964); *R.B. Butler, Inc.,* 160 NLRB 1595 (1966); *W. P. Butler Company,* 244 NLRB 1039 (1974); *Dick Kelchner Excavating Company,* 236 NLRB 1414 (1978); and *Brown & Root, Inc.,* 259 NLRB 1002 (1981).

The Employer requested review of the Regional Director's Decision and Direction of Election and the Board subsequently denied review. Based upon the Board's denial of review, the Employer's argument for a multi-craft "wall-to-wall" unit has been addressed and dismissed.

The Board Agent who conducted the NLRB election challenged the ballots in Unit A and Unit B of employees W.R. Burns, J.R. Citizen, B.R. Demeritt, J.C. Matney, A.J. Reeves, M.J. Reeves, and M.A. Williams because their

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[2] The Petitioner in this proceeding subpoenaed from the employer a Directory of Employees listing employee's dominant craft skills. The Petitioners offered this document into evidence as Petitioner's Exhibit 6 and its contents were received without objection.

names appeared on the *Excelsior* voter eligibility lists for both Unit A and Unit B.

The Employer's attorney contends that all of the above employees perform work in both Unit A and Unit B making them eligible voters in each separate unit. On the other hand, the attorney for Local 406 and Local 106 contends that the employee's dominant craft skill is controlling and therefore, should be included in the unit set forth opposite their name as follows:

W. R. Burns .....(Operator - Unit B)
J. R. Citizen .....(Operator - Unit B)
B. R. Demeritt .....(Pipefitter - Unit A)
J. C. Matney .....(Pipefitter - Unit A)
A. J. Reeves .....(Estimator - Excluded not in Unit A or Unit B)
M. J. Reeves ....(Fuel driver - Excluded not in Unit A or Unit B)
M. A. Williams .....(Pipefitter - Unit A)

W. R. Burns

W. R. Burns testified that he performed seventy percent (70%) of his work time as an operator and thirty percent (30%) of his work time as a pipefitter. Evidence was introduced through Petitioner's Exhibit 6, (I.M.T.C. Inc. Directory of Employees), Exhibit 7 (Daily Time Card Labor Report) and Exhibit 8 (Conoco Contract) which established that W. R. Burns' dominant craft skill at all relevant time periods has been that of an operator. Although Burns had performed pipefitting duties in the past, his testimony and the evidence overwhelmingly reveal that he performed heavy equipment operator work and is within his dominant craft skill as an operator.

Accordingly, the Hearing Officer finds that W. R.

Burns' dominant craft skill is an operator. The Hearing Officer recommends to the Regional Director that the Board's challenge to W. R. Burns in Unit A be sustained. The Hearing Officer further finds that W. R. Burns is an eligible voter in Unit B and recommends to the Regional Director that the Board's challenge to W. R. Burns in Unit B be overruled, opened and counted.

J. R. Citizen

J. R. Citizen testified that he performed fifty percent (50%) of his work time as an operator and thirty (30%) to forty percent (40%) of his work time as a pipefitter. The remainder of his work time he performed as a general helper/laborer. Petitioner's Exhibit 6 establishes that J. R. Citizen's dominant craft skill is that of an operator. Petitioner's Exhibit 10 discloses that J. R. Citizen applied for an operator's position with I.M.T.C. in 1984. The testimony received in the hearing from J. R. Citizen concerning the Hearing Officer's questions as to what work was performed at relevant time periods overwhelmingly establishes that he performed work on heavy equipment and is within his dominant craft skill as an operator.

The Hearing Officer finds that J. R. citizen's dominant craft skill is an operator. The Hearing Officer recommends to the Regional Director that the Board's challenge to J. R. Citizen in Unit A be sustained. The Hearing Officer further finds that J. R. Citizen is an eligible voter in Unit B and recommends to the Regional Director that the Board's challenge to W. R. Burns in Unit B be overruled, opened and counted.

B. R. Demeritt

B. R. Demeritt testified that he performed forty per-

cent (40%) of his work time as a pipefitter, forty percent (40%) of his work time as an operator and twenty percent (20%) of his work time as a general helper. Demeritt further testified that he can perform all the duties of a pipefitter and is somewhat limited in his skills as a heavy equipment operator. Petitioner's Exhibit 6 establishes that B. R. Demeritt's dominant craft skill is a pipefitter and is paid the pipefitter wages.

The Hearing Officer finds that B. R. Demeritt's dominant craft skill is a pipefitter. The Hearing Officer recommends to the Regional Director that the Board's challenge to B. R. Demeritt in Unit B be sustained. The Hearing Officer further finds that B. R. Demeritt is an eligible voter in Unit A and recommends to the Regional Director that the Board's challenge to B. R. Demeritt in Unit A be overruled, opened and counted.

J. C. Matney

Frank Reeves, Assistant Project superintendent, testified that he was Matney's immediate supervisor, that Matney performed fifty percent (50%) pipefitting work and fifty percent (50%) operator work. The record establishes that as his supervisor Reeves considered Matney's dominant craft skill to be that of a pipefitter and that his skills in heavy equipment operator work was limited. Petitioner's Exhibit 6 establishes that Matney's dominant craft skill is a pipefitter and is paid at the pipefitter's wages.

The Hearing Officer finds that J. C. Matney's skills as a heavy equipment operator are limited. The evidence establishes that he was substantially performing work as a pipefitter and his immediate supervisor considered Matney's dominant craft skill to be a pipefitter. The Hearing Officer recommends to the Regional Director that the

challenge to the ballot of J. C. Matney in Unit B be sustained. The Hearing Officer further recommends that J. C. Matney is an eligible voter in Unit A and the challenge to his ballot in Unit A be overruled, opened and counted.

A. J. REEVES

A. J. Reeves testified that during all relevant time periods the majority of his work time is spent at the laydown yard working with the expediting crew. The record discloses in the Decision and Direction of Election that the expediting crew is excluded from Unit A and Unit B. The record additionally disclosed that A. J. Reeves is a qualified pipefitter and has performed work as a pipefitter and operator. He has received on the job training for both pipefitter and operator positions. Petitioner's Exhibit 6 classified A. J. Reeves dominant craft skill as a pipefitter earning a pipefitter wage. Although, A. J. Reeves is performing work as an expediter, his dominant craft skill is a pipefitter. In the construction industry it is not uncommon for employees to become Lead foreman, Senior foreman or perform work that is not within their dominant craft skill. However, the evidence in the record overwhelmingly supports a finding that A. J. Reeves' performed work as an *expediter* at all relevant time periods.

The Hearing Officer finds that A. J. Reeves is an expediter and this classification is excluded from both Unit A and Unit B. The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A and Unit B be sustained.

M. J. REEVES

Larry Williams is the Employers Construction Manager and testified that he was M. J. Reeves immediate

supervisor. Williams testified that M. J. Reeves is a helper and that one of his jobs is to fuel up equipment at all job sites. He also assists mechanics, changing oil and lubricating equipment and/or trucks. Petitioner's Exhibit 6 discloses that M. J. Reeves dominant craft skill is a *helper* and *drives a fuel truck*. The record does not support a finding that M. J. Reeves dominant craft skill as a helper is within the classification set forth in Unit A or Unit B.

The Hearing Officer finds that M. J. Reeves is a mechanics helper who drives a fuel truck. The Hearing Officer recommends to the Regional Director that the challenge to the ballot of M. J. Reeves in Unit A and Unit B be sustained.

M. A. Williams

M. A. Williams testified that he is a pipefitter. The record discloses that the majority of work performed at all relevant time periods was as a pipefitter. He did perform heavy equipment operator work but this was not substantial. Petitioner's Exhibit 6 discloses that the employer classified M. A. Williams dominant craft skill as a pipefitter earning a pipefitter wage. The record discloses that M. A. Williams quit his employment on September 17, 1989 and was rehired on February 4, 1990. Under these circumstances, M. A. Williams does not meet the eligibility formula stipulated by the parties since he had voluntarily quit on September 17, 1989 and was rehired the week of February 4, 1990 after issuance of the Decision and Direction of Election.

The Hearing Officer finds that M. A. Williams is an ineligible voter and recommends to the Regional Director that the challenge to his ballot in Unit A and Unit B be sustained.

The Board Agent who conducted the NLRB election in Unit A and Unit B challenged the ballots of Russell C. Ross, James Taylor and James Venable in Unit A and Terry Gaskin in Unit B because their names did not appear on the Excelsior voter eligibility lists.

Russell C. Ross

The Employer contends that Russell C. Ross, a lead foreman was layed off from employment on December 23, 1989 and is an ineligible voter. Local 106, contrary to the employer contends that Ross was not a supervisor but a pipefitter when he was layed off and is therefore an eligible voter.

The record establishes that Ross was hired as a pipefitter and was promoted to the position of lead foreman on September 13, 1989. Ross testified he remained a lead foreman until the mid to end of November, 1989 when the job he was supervising finished. He was then transferred to a crew working for Marion Broussette, a lead foreman until his layoff on December 12, 1989. Employer's Exhibit 15 (Termination slip) discloses that Ross was terminated in a reduction in force on December 12, 1989 and the termination slip listed Ross's position as a mechanic A. Under these circumstances, it appears that Ross was not a supervisor at the time of his layoff. Evidence has been introduced in the record through Stan Hegener, President of I.M.T.C. that Ross was subject to recall and meets the eligibility criteria set forth in the Decision and Direction of Election.

The Hearing Officer finds that Russell C. Ross dominant craft skill is pipefitting and is an eligible-voter and recommends to the Regional Director that the challenged to his ballot in Unit A be overruled, opened and counted.

James Taylor

The employer contends that James Taylor, a lead foreman was layed off from employment on December 21, 1989 and is an ineligible voter. Local 106, contrary to the employer contends that Taylor was not a supervisor when he was layed off but was a pipefitter and is an eligible voter.

The record establishes that Taylor was hired as a pipefitter and was promoted to a lead foreman on September 18, 1989. Taylor testified that on December 5, 1989 he approached his supervisor, Will Sonnier the field Superintendent and told him that he did not want to be a lead foreman and wanted to use his tools again and work as a pipefitter. Sonnier agreed that he did not have to be a lead foreman but to hold the position for a day or so until Manson Pitre, a senior-foreman would finish up a project and assume his duties. Sonnier further told him that he would leave him at the lead foreman pay but he would work with this Tools. Russell Ross was present in this conversation and corroborates Taylor's testimony.

One week later, Taylor again requested of Sonnier to cut his wages to a journeymen rate but Sonnier did not follow through.

Taylor further testified that he worked as a pipefitter from December 7, 1989 to his layoff on December 21, 1989, the day after the NLRB representation hearing. Although, Taylor's termination slip discloses that he was layed off as a lead foreman, the testimony of Ross and Taylor support a finding that Taylor was a pipefitter at the time of his layoff. I credit Taylor's and Ross's testimony. Evidence has been introduced into the record establishing that there existed an expectancy of recall for Taylor through Stan Hegener's testimony. Taylor meets the eligibility criteria set forth in the Decision and Direction of Election.

The Hearing Officer finds that Taylor's dominant craft skill is a pipefitter and is an eligible voter and recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

James Venable

The Employer contends that James Venable is an ineligible voter in Unit A because he was a lead foreman at the time of the NLRB election and alternatively did not have the hours in the six months period prior to the Decision and Direction of Election. Local 106, contrary to the employer contends that James Venable did have the requisite 30 days of work prior to the Decision and Direction of Election and is an eligible voter in Unit A.

Petitioner's Exhibit 6 discloses that James Venable's dominant craft skill is a pipefitter and earned a pipefitter wage. Employer's Exhibit 12 discloses that Venable quit employment on October 16, 1989, was rehired on January 9, 1990 as a mechanic A, and was promoted to a lead foreman on January 11, 1990, one day prior to issuance of the Decision and Direction of Election. He worked as a lead foreman until February 12, 1990, four days after the NLRB election. The lead foreman classification is a supervisory position and was excluded from Unit A.

The Hearing Officer finds that James Venable at the time of the NLRB election was a lead foreman, a classification excluded from the unit. The Hearing Officer recommends to the Regional Director that the challenge to the ballot of James Venable be sustained.

Terry Gaskin

The Employer contends that Terry Gaskin is an in-

eligible voter in Unit B that he quit his employment on August 13, 1989. Local 406, contrary to the employer contends that Terry Gaskin is an eligible voter, that he had an expectancy of recall.

Petitioner's Exhibit 6 discloses that Terry Gaskin is an operator. The record discloses that he quit his employment on August 13, 1989. Terry Gaskin testified that four weeks later he telephoned Will Sonnier, superintendent and asked him for a job. Sonnier told him that he had some work coming up, for him to give him (Sonnier) a call back in two weeks. Gaskin stated that when he called back he learned that Sonnier was no longer working. Gaskin continued to testify that he was offered employment by Sonnier. The Hearing Officer is not convinced by Terry Gaskin's testimony and does not credit his testimony as to being offered any employment.

The Hearing Officer finds that Terry Gaskin quit his employment on August 13, 1989 and is an ineligible voter in Unit B. The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit B be sustained.

THE EMPLOYER'S CHALLENGES UNIT A AND UNIT B

The Employer challenged the ballots of J. P. Areno III, N. A. Doucet, Gary Fee, A. D. Givens, Michael Mathews and Chad Richmond in Unit A because they were not employed on February 8, 1990 the day of the NLRB election and because they did not have the sufficient hours for eligibility required prior to the issuance of the Decision and Direction of Election.

The Employer challenged the ballots of J. C. Fruge,

James Gaskin and R. Livingston in Unit B because their names were not on the *Excelsior* voter eligibility list. The Employer additionally contends that J. C. Fruge quit his employment, and that James Gaskin and R. Livingston are mechanics and are not in the unit.

The Employer, Local 106 and Local 406 stipulated to a modified *Daniel's Construction, Inc.*, 167 NLRB 1078, eligibility formula in the prior representation hearing as follows:

> Employees eligible to vote shall be employees who have worked at least thirty days (30) in the six month period immediately preceding the issuance of the Decision and Direction of Election, as well as those employees who are on the payroll at the time of the decision issuing; excluding those persons who have voluntarily quit or been terminated for cause prior to the completion of the last job on which they worked.

In determining eligibility the Employer seeks to interpret the above eligibility formula in terms of 240 hours instead of the clear and unmistakenly plain language of 30 work days. The Hearing Officer finds that the record does not support the Employer's interpretation that 240 hours should be utilized rather than 30 work days, but yet, such an interpretation is not unreasonable.

J. P. Areno III

Stan Hegener, the President of I.M.T.C. testified that J. P. Areno III, a pipewelder was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 6 discloses that J. P. Areno III was layed off in a reduction in force on January 29, 1990. Employer's Exhibit 6 discloses further that J. P. Areno III worked 12 working

days prior to January 12, 1990. J. P. Areno III does not meet the thirty (30) day work test eligibility requirement prior to issuance of the Decision and Direction of Election. Although J. P. Areno III was layed off on January 29, 1990 in a reduction in force, the layoff was not for *cause*, nor was any evidence introduced that the job he was working on was completed. The record additionally discloses that Stan Hegener testified that J. P. Areno III was subject to recall.

The Hearing Officer finds that J. P. Areno III is an eligible voter in Unit A since he was employed on January 12, 1990 the date the Decision and Direction of Election issued and is subject to recall.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

N. A. Doucet

Stan Hegener, the President of I.M.T.C. testified that N. A. Doucet a pipewelder was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 7 discloses that N. A. Doucet was layed off in a reduction in force on January 29, 1990. Employer's Exhibit 7 discloses further that N. A. Doucet worked 12 working days prior to January 12, 1990. N. A. Doucet does not meet the thirty (30) day work test eligibility requirement prior to issuance of the Decision and Direction of Election. Although N. A. Doucet was layed off on January 29, 1990 in a reduction in force, the layoff was not for *cause*, nor was any evidence introduced that the job he was working on was completed. The record additionally discloses that Stan Hegener testified that N. A. Doucet was subject to recall.

The Hearing Officer finds that N. A. Doucet is an eligible voter in Unit A since he was employed on January 12, 1990 the date the Decision and Direction of Election issued and is subject to recall.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

Gary Fee

Stan Hegener, the President of I.M.T.C. testified that Gary Fee, a pipefitter was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 8 discloses that Gary Fee was layed off in a reduction in force on January 31, 1990. Employer's Exhibit 8 discloses further that Gary Fee worked 21 working days prior to January 12, 1990. Gary Fee does not meet the thirty (30) day work test eligibility requirement prior to issuance of the Decision and Direction of Election. Although Gary Fee was layed off on January 31, 1990 in a reduction in force, the layoff was not for *cause*, nor was any evidence introduced that the job he was working on was completed. The record additionally discloses that Stan Hegener testified that Gary Fee was subject to recall.

The Hearing Officer finds that Gary Fee is an eligible voter in Unit A since he was employed on January 12, 1990 the date the Decision and Direction of Election issued and is subject to recall.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

A. D. Givens

Stan Hegener, the President of I.M.T.C. testified that A. D. Givens, a pipefitter was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 9 discloses that A. D. Givens was layed off in a reduction in force on January 30, 1990. Employer's Exhibit 9 discloses further that A. D. Givens worked 22 working days prior to January 12, 1990. A. D. Givens does not meet the thirty (30) day work test eligibility requirement prior to issuance of the Decision and Direction of Election. Although A. D. Givens was layed off on January 30, 1990 in a reduction in force, the layoff was not for *cause*, nor was any evidence introduced that the job he was working on was completed. The record additionally discloses that Stan Hegener testified that A. D. Givens was subject to recall.

The Hearing Officer finds that A. D. Givens is an eligible voter in Unit A since he was employed on January 12, 1990 the date the Decision and Direction of Election issued and is subject to recall.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

Michael Mathews

Stan Hegener, the President of I.M.T.C. testified that Michael Mathews, a pipewelder was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 10 discloses that Michael Mathews was layed off in a reduction in force on January 31, 1990. Employer's Exhibit 10 discloses further that Michael Mathews worked 26 working

days prior to January 12, 1990. Michael Mathews does not meet the thirty (30) day work test eligibility requirement prior to issuance of the Decision and Direction of Election. Although Michael Mathew was layed off on January 31, 1990 in a reduction in force, the layoff was not for *cause*, nor was any evidence introduced that the job he was working on was completed. The record additionally discloses that Stan Hegener testified that Michael Mathews was subject to recall.

The Hearing Officer finds that Michael Mathews is an eligible voter in Unit A since he was employed on January 12, 1990 the date the Decision and Direction of Election issued and is subject to recall.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit A be overruled, opened and counted.

Chad Richmond

Stan Hegener, the President of I.M.T.C. testified that Chad Richmond was employed by the employer as of January 12, 1990, the date the Decision and Direction of Election issued. Employer's Exhibit 11 discloses that Chad Richmond was layed off in a reduction in force on February 2, 1990. The record additionally discloses through Petitioner's Exhibit 6 that Chad Richmonds dominant craft skill is a Boilermaker. The classification of Boilermaker is not included in Unit A.

The Hearing Officer finds that Chad Richmond is an ineligible voter in Unit A since he is a Boilermaker.

Under these circumstances, the Hearing Officer recommends to the Regional Director that the challenge to

his ballot in Unit A sustained.

J. C. Fruge

J. C. Fruge, an operator testified that he was layed off in October, 1989 and was subject to recall. On January 17, 1990 J. C. Fruge was recalled back to work. Petitioner's Exhibit 4 discloses that he was offered a position and refused to work for $11.50 an hour as a mechanic B, and quit on his own accord.

Under these circumstances, the Hearing Officer finds that J. C. Fruge quit on his own accord and is an ineligible voter in Unit B.

The Hearing Officer recommends to the Regional Director that the challenge to his ballot in Unit B be sustained.

James T. Gaskin

James T. Gaskin testified that he is a mechanic and has been employed at I.M.T.C. as a mechanic since February 11, 1989. Petitioner's Exhibit 6 discloses that his dominant craft skill is a mechanic. Gaskin testified that he went through an oiler apprenticeship program with the Operating Engineers Local 406. Gaskin further testified that as a mechanic he needs to know how to operate all heavy equipment in order to do his job. Gaskin testified that 99% of his time is performing duties as a mechanic. Sonny Mason, the Business Manager for Local 406 testified that they have a collective bargaining history of representing operators and mechanics before employers.

Although, mechanics have been traditionally included with operators, the Decision and Direction of Election

does not provide specifically, for inclusion or exclusion of mechanics in Unit B. However, Unit B does exclude "all other employees" and mechanics under these conditions would be considered within that category.

The Hearing Officer finds that James T. Gaskin is an ineligible voter in Unit B and recommends to the Regional Director that the challenge to his ballot in Unit B be sustained.

R. Livingston

R. Livingston testified that he is a mechanic and has worked out of Local 406 as an operator. Livingston states he is proficient with all pieces of heavy equipment. Petitioner's Exhibit 6 disclosed that his dominant craft skill is a mechanic. Livingston testified that 60% of his work time is spent repairing heavy equipment as a mechanic and 40% of his work time is spent performing operator's duties. Sonny Mason, the Business Manager for Local 406 testified that they have a collective bargaining history of representing operators and mechanics before employers.

Although, mechanics have been traditionally included with operators, the Decision and Direction of Election does not provide specifically for inclusion or exclusion of mechanics in Unit B. However, Unit B does exclude "all other employees" and mechanics under these conditions would be considered within that category.

The Hearing Officer finds that R. Livingston is an ineligible voter in Unit B and recommends to the Regional Director that the challenge to his ballot in Unit B be sustained.

THE UNION'S CHALLENGES
UNIT A

Local 106 challenged the ballots in Unit A of employees Cliff Doucet, B.M. Fontenot, C. J. Fontenot, G. R. Fontenot, M. D. Fontenot, and G. E. Whatley because they are carpenters and are not in the unit.

Local 106 additionally challenged the ballots in Unit A of employees J. A. Buller, R. J. Bushnell, G. Citizen, M. Collins, J. B. Fontenot, E. P. Guillory, J. J. Guillory, L. P. Guillory, M. Guillory, O. Guillory, D. L. Reed, and W. Woolridge because they are laborers/carpenter helpers and are not in the unit.

The Employer, contrary to Local 106 contend that all of the above employees are eligible voters in Unit A.

Petitioner's Exhibit 6 discloses that the dominant craft skill of the challenged employees are as follows:

Cliff Doucet (Carpenter),
C. J. Fontenot (Carpenter),
M. D. Fontenot (Carpenter),
J. A. Buller (Laborer),
G. Citizen (Helper),
W. J. Clophus (Helper),
E. P. Guillory (Helper),
L. P. Guillory (Helper),
O. Guillory (Helper),
W. Woolridge (Helper).
B.M.Fontenot (Carpenter),
G. R. Fontenot (Laborer),
G. E. Whatley (Carpenter),
R. J. Busknell (Helper),
M. Collins (Helper),
J. B. Fontenot (Helper),
J. J. Guillory (Helper),
M. Guillory (Helper),
D. L. Reed (Helper, and

Petitioner's Exhibit 7 (Conoco Daily Time Card Labor Report) dated September 28, 1990 through January 8, 1990 and Petitioner's Exhibit B (Conoco Contract No. 87-017) discloses that the dominant craft skills of the following challenged employees:

B. M. Fontenot (Carpenter)
J. J. Guillory (Helper)
O. Guillory (Helper)
J. B. Fontenot (Helper)
G. E. Whatley (Carpenter)
M. D. Fontenot (Carpenter)
W. Woolridge (Helper)
E. P. Guillory (Helper)
R. J. Bushnell (Helper)
L. P. Guillory (Helper)
Cliff Doucet (Carpenter)
M. Collins (Helper)
M. Guillory (Helper)
C. J. Fontenot (Carpenter)

Local 106 called as its witnesses Greg Dowies (Senior Carpenter Foreman), I. T. Green (Lead Foreman), W. J. Clophus (Helper), Ervin Welfare (Helper), Billy Stark (Carpenter), and Onezime Guillory (Helper). Greg Dowies, Senior Carpenter Foreman testified that the following employees performed carpentery work under his supervision; Cliff Doucet, B. M. Fontenot, C. J. Fontenot, M. D. Fontenot, G. E. Whatley, M. Collins, W. J. Clophus, J. B. Fontenot, E. P. Guillory, J. J. Guillory, L. P. Guillory, and M. Guillory. Dowies testified that as Senior Carpenter Foreman, the carpenters that worked with him were Cliff Doucet, B. M. Fontenot, C. J. Fontenot, M. D. Fontenot and G. E. Whatley. He further testified that J. A. Buller performed work as a laborer, and M. Collins, W. J. Clophus, J. B. Fontenot, E. P. Guillory, J. J. Guillory, L. P. Guillory, M. Guillory and W. Woolridge performed work as carpenter helpers. Dowies stated that at no time did the above employees ever perform any pipefitting or pipefitting helper work.

I. T. Greene, a lead carpenter foreman additionally testified that; G. R. Fontenot performed work as a

laborer/helper, R. J. Bushnell performed work as a carpenter helper, M. Collins performed work as a carpenter helper, J. B. Fontenot performed work as a carpenter helper, E. P. Guillory performed work as a carpenter helper, J. J. Guillory performed work as a carpenter helper, M. Guillory performed work as a carpenter helper, D. L. Reed performed work as a carpenter helper and W. Woolridge performed work as a carpenter helper.

W. J. Clophus, Ervin Welfare, Billy Stark and Onezime Guillory testimony corroborates the testimony of Greg Dowies and I. T. Greene.

The Employer called as its witnesses Cliff Granger, Frank Reeves, and Stan Hegener regarding the duties performed by the above employees. They testified that the above employees also performed pipefitting helper work.

However, the preponderance of evidence received and exhibits offered into the record overwhelmingly establishes that the above employees substantially performed carpentry or carpenter helper work which is within their dominant craft skills.

Under these circumstances, the Hearing Officer finds that the dominant craft skills of employees Cliff Doucet, B. M. Fontenot, C. J. Fontenot, G. R. Fontenot, M. D. Fontenot, G. E. Whatley, J. A. Buller, R. J. Bushnell, G. Citizen, M. Collins, W. J. Clophus, J. B. Fontenot, E. P. Guillory, J. J. Guillory, L. P. Guillory, M. Guillory, O. Guillory, D. L. Reed, and W. Woolridge are not included in Unit A and are, therefore, ineligible voters in Unit A. The Hearing Officer recommends to the Regional Director that the challenge to their ballots in Unit A be sustained.

THE OBJECTIONS
UNIT A AND UNIT B

In the hearing, the Employer in Case 15-RC-7492 (Unit A) requested withdrawal of Objections Nos. 3, 6, 7, 8 and 10.

The Employer in Case 15-RC-7497 (Unit B) requested withdrawal of Objections Nos. 1, 2(a), 4 and 5.

Local 106 and Local 406 (Unit A and Unit B) requested withdrawal of Objections Nos. 1, 2 and 5.

The Hearing Officer recommends to the Regional Director that Employer's request for withdrawal of Objections Nos. 3, 6, 7, 8, and 10 in Unit A, Employer's request for withdrawal of Objections Nos. 1, 2(a), 4, and 5 in Unit B, and Local 106 and Local 406 request for withdrawal of Objections Nos. 1, 2, and 5 be approved.

THE EMPLOYER'S OBJECTIONS
UNIT A AND UNIT B

In this report, the Employer's objections in Unit A and Unit B were consolidated as they involved similar issues.

OBJECTION 1(A), (B), (C) - UNIT A

(1) The election arrangements dictated by the NLRB did not provide a reasonable opportunity for all eligible voters to vote in the election for the following reasons:

(a) The NLRB's refusal to provide for a mail ballot election deprived many employees and "formula" eligible employees a reasonable opportunity to vote in the

election.

(b) The refusal to provide a mail ballot election for the construction project employees created the possibility that the election could be adversely affected by inclement weather and, in fact, inclement weather caused all construction projects to be shut down by 7:30 a.m. This eliminated a reasonable opportunity to vote for many of the construction workers.

(c) The Regional Director was aware of the fact that many "formula" eligible ex-employees would have to travel a significant distance to the polling area, but still unreasonably refused to allow a mail ballot election.

The Employer contends that the Regional Director's reliance on a manual election in lieu of a mail ballot election is per se Objectionable Conduct. The Employer by letter requested of the Regional Director on January 29, 1990 to utilize the mail ballot procedure because of logistics (farthest plant 10 miles away) and because sixty (60) employees who were eligible voters were not presently employed by the employer.

The record discloses that the employer provided to the Regional Office *Excelsior* lists for Unit A and Unit B. Upon receipt of the Excelsior lists, the Regional Office issued Notice to Election to all eligible voters contained therein. The manual election provided for three (3) polling periods on February 8, 1990, 5:00 a.m. to 7:30 a.m., 11:30 a.m. to 1:00 p.m. and 5:00 p.m. to 7:30 p.m.

The Tally of Ballots in Unit A discloses that there were 179 eligible voters and 137 votes were cast. The Tally of Ballots in Unit B discloses that there were 26 eligible voters and 23 votes were cast.

The Regional Director in scheduling a manual election relied upon his discretionary authority pursuant to Section 11336 of the NLRB casehandling manual. He also relied upon case authorities *Mission Industries*, 283 NLRB No. 154 slip opinion at 3 (1987) and *Brinks Armored Car*, 278 NLRB 141, which stands for the proposition that mail ballot elections are more vulnerable to the destruction of laboratory conditions than are on-site elections. Further, in *Lemco Construction, Inc.*, 283 NLRB No. 68 (1987), the Board abandoned any analysis dependent on numerical tests and will issue certifications where there is *adequate notice and opportunity to vote* and where employees are not prevented from voting by any unlawful conduct or unfairness in the scheduling or mechanics of the election. In this case, all employees whose names appeared on the *Excelsior* lists were given Notice of the Election by the employer as well as the NLRB Regional Office.

The Hearing Officer finds that Employer's Objection 1(a), (b) and (c) are not Objectionable conduct. The Hearing Officer recommends to the Regional Director that Employer's Objection 1(a), (b), and (c) in Unit A be overruled.

OBJECTION 2 AND 12 - UNIT A

(2) Although alerted to the fact that at least two members of the Local 106 organizing committee held supervisory positions with I.M.T.C., Inc., the NLRB failed to conduct an investigation into the employer's contention that Local 106's showing of interest and campaign was illegally influenced by the support and participation of at least two individuals who held supervisory positions with the employer.

The Employer contends that Objection 2 and 12 are

Objectionable conduct because the NLRB failed to conduct an administrative investigation of supervisory taint.

The record discloses that the employer notified the Regional Director after the filing of the petitions' that James Taylor and Russell Ross, lead men (supervisors) were part of Local 106's organizing committee. The record additionally discloses that the employer did not provide any evidence to the Regional Director that these alleged supervisors were involved in the organizing campaign prior to and after the filing of the petition or that they actually solicited employee signatures on union authorization cards. Based upon the lack of evidence, the Regional Director exercised his discretion not to undertake an administrative investigation. Moreover, testimony adduced in the hearing from James Taylor and Russell Ross does not disclose any evidence of pro-union conduct after the petition had been filed nor any evidence of supervisory taint. *Cal-Western Transport*, 283 NLRB No. 66

The Hearing Officer finds that the evidence in the record is insufficient to establish Objectionable Conduct on Employer's Objection 2 and 12 and recommends to the Regional Director that Employers Objection 2 and 12 be overruled.

OBJECTION 4 AND 11 - UNIT A AND AND OBJECTION 3 AND 6 - UNIT B

(4) and (3) The NLRB's "Decision and Direction of Election" was contrary to the facts developed during the representation hearing, and contrary to the law applicable to the record evidence, in determining that a voting unit consisted of pipefitters, pipewelders and pipehelpers and in determining that a unit comprised of all operating engineers was an appropriate bargaining unit.

(11) and (6) The NLRB's "Decision and Direction of Election" was legally flawed by failing to provide a criteria for the employer to utilize in determining the identity of the individual employees who comprised the unit of pipefitters, pipewelders, pipehelpers and the unit of all operating engineers.

The Employer contends that the findings of the Regional Director in its Decision and Direction of Election is Objectionable conduct.

The Employer sought review of the Regional Director's Decision and Direction of Election and such review was subsequently denied by the Board.

The Employer has not provided any additional evidence to the hearing Officer other than he does not agree with the findings made therein by the Regional Director. Based upon the Board's denial of review, the Employer's arguments herein have been addressed and dismissed.

The Hearing Officer finds that the employer has not provided any evidence to support said Objections 4 and 11 in Unit A and Objections 3 and 16 in Unit B and recommends to the Regional Director they be overruled.

OBJECTION 5 - UNIT A

(5) The NLRB illegally intruded into the election process by challenging the votes of approximately seven individuals on the basis of these individuals being incorrectly included on the eligibility list.

The Employer alleges that the Board objectionably intruded into the election by challenging the votes of seven individuals whose names appeared on the *Excelsior* lists of

Unit A and Unit B, and as result comprised its impartiality.

In the hearing the employer did not present any testimony to support its Objection that the Board Agents conduct affected the results of the election but argues that it has been prejudiced by the Board, by its challenges, rising to the level of objectionable conduct.

The record discloses that on January 26, 1990 Local 106 and Local 406 through its attorney notified the NLRB that seven individuals names appeared on the *Excelsior* list of both Unit A and Unit B. He informed the Regional Office that the Employer submitted its Excelsior list in total disregard for the Regional Director's finding of separate craft units. He requested the Regional Office to contact the Employer to revise the lists to comport with the *Excelsior* rule. The record is silent as to whether the Regional Office contacted the employer. In any event, prior to the election Local 106 and Local 406 notified the NLRB Regional Office that a question concerning eligibility existed as to these seven employees. Sonny Mason, Local 406 Business Agent and Garland Broussard. Local 106 Business Agent testified that in the pre-election conference the Board Agent stated that a question concerning eligibility was raised and the Board Agent would challenge the ballots of the seven employees in Unit A and Unit B. Mason and Broussard stated that if the Board Agent had not challenged the ballots of the seven employees in Unit A and Unit B they would have.

Section 11338 (challenges) of the Representation Casehandling Manual provides that a Board Agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote. The Board Agent challenged the ballots of seven employees in Unit A and

Unit B because they were on the *Excelsior* lists for both Unit A and Unit B. The Employer has not presented any evidence to establish that the challenges were prejudicial. Further, there is no basis here for finding that the Board Agent's conduct affected the results of the election. See *Galli Produce Co., Inc.*, 269 NLRB 478 (1984).

The Hearing Officer finds that the Board Agent's challenges to the ballots of seven employees whose names appeared on the *Excelsior* lists of both Unit A and Unit B are not Objectionable conduct and recommends to the Regional Director that Objection No. 5 in Unit A be overruled.

OBJECTION 9 - UNIT A

(9) Throughout the day of the election, Local 106 supporters and representatives demonstrated along the only public highway leading to the polling place and attempted to illegally influence the outcome of the election by demonstrating individually and in large groups utilizing pro-union campaign propaganda throughout their demonstration.

The Employer contends that Local 106 election campaigning on February 8, 1990, the day of the election is interference and Objectionable Conduct to affect the results of the election.

In support of its Objection the employer called as its witness Stan Hegener, President of I.M.T.C. Hegener testified that he videotaped Local 106 supporters demonstrating along the only public highway leading to the polling area. Hegener testified that the election campaigning was occurring one third of a mile from the polling area. The videotape was introduced into the record as

Employer's Exhibit 33 and discloses that the supporters of Local 106 are employees of I.M.T.C. and were engaged in electioneering. The videotape also disclosed election campaign propaganda at various places along the highway leading to the polling area. Hegener further testified that he did not have any knowledge or evidence to present that electioneering occurred within the polling area or in close proximity to the polls.

The Board in *NLRB v. Del Rey Tortilleria*, 823 F2d 1135, 125 LRRM 3140 (CA 7, 1987), 272 NLRB No. 175 (1984) found that electioneering during an election, on the employer's premises, but substantially outside the designated polling area, will not warrant setting aside the election. In this case, electioneering was occurring on a public highway one-third of a mile away from the polling area and the employer's premises.

The Hearing Officer finds that the electioneering engaged in by Local 106 is permissible and not Objectionable conduct.

The Hearing Officer recommends to Regional Director that Objection 9 in Unit A be overruled.

THE UNION'S OBJECTIONS UNIT A AND UNIT B

(3) The Employer, through its agents, unilaterally created a requirement that individuals work a minimum of 240 hours in the six month period preceding the Decision and Direction of Election, which was contrary to the

eligibility formula ordered by the Regional Director, and thereby prejudicing Petitioners.

Local 406 and Local 106 contend that the Employer's interpretation of thirty (30) work days to be 240 hours prejudiced the Petitioners in computing employees eligibility for Unit A and Unit B.

Local 406 and Local 106 argue that no hourly formula was agreed to or directed by the Regional Director. They further argue that it is not unusual in the construction industry for employees to work and be sent home after working less than eight hours.

Local 406 and Local 106 submit that working day formulas have been used by the Board in the oil field, *Hondo Drilling Company*, 164 NLRB No. 67. However, they contend that the Board in *Daniel's Construction Company*, 167 NLRB 1078, referred only to the employee being employed *30 days* during the one-year period and made no mention of 30 working days.

The record discloses that the Employer, Local 406 and Local 106 stipulated to a modified *Daniel's Construction Company*, supra eligibility formula where *thirty (30) working days* was one of the stipulated eligibility tests. The employer's interpretation of 30 working days to be 240 hours is not an unreasonable assumption of the Employer. Local 406 and Local 106 has not presented any other evidence to establish that they were prejudiced or that the employer's interpretation interfered with the election to affect the results of the election.

The Hearing Officer finds that the employer's interpretation is not objectionable conduct or unreasonable to have prejudiced the petitioners.

The Hearing Officer recommends to the Regional Director that Objection 3 in Unit A and Unit B be overruled.

OBJECTION 4 - UNIT A AND UNIT B

4. The Employer, through its election observer Vickie M. Reeves, engaged in prohibited electioneering in the polling place by fraternizing with eligible voters as they appeared to vote, although repeatedly admonished by the Board's agent to refrain from such conduct, and thereby prejudicing Petitioners.

Frank Boudreaux, a pipefitter and Charles Deason, an operator, testified that they were Local 106's and Local 406's election observers respectively. Vickie Reeves was the Employer's observer. Boudreaux and Deason testified that the Board Agent instructed the observers at the pre-election conference not to speak to the voters who were in line to vote. Boudreaux and Deason state that they complied with the instructions but that Vickie Reeves did not. They stated that Ms. Reeves was very friendly and would say, "Good Morning" to prospective voters. They approximated that she said, "Good Morning" to half the voters even when told by the Board Agent not to talk to them. Boudreaux said that on one occasion Ms. Reeves knew the voter, and asked how their baby was and if their baby was sleeping all night. Boudreaux said that this was the extent of her conversation with the voters.

Local 106 and Local 406 alleges that Ms. Reeves engaged in impermissable conversation with the voters in the polling area while as an observer, and was admonished by the Board Agent to refrain from such conduct to no avail and is per se objectionable.

In *Modern Hard Chrome Service Company*, 187 NLRB 82 (1970), the Board stated that the Petitioner's observer continued to converse with employees who approached the voting table, "beyond a mere hello", despite having been specifically admonished by the Board Agent for having engaged in such conversations. However, the Board in *Milchem, Inc.*, 170 NLRB No. 46 stated that a chance "hello" will not suffice to set aside an election.

In this case, Ms. Reeves said, "Good Morning" to a number of voters as they approached. The record does not establish that she engaged in any other impermissable conversations with voters in the polling area other than asking one voter about their baby. In *Textile Workers v. NLRB*, 815 F2d 225, 125 LRRM 2832 (CA2, 1987), 280 NLRB No. 100 (1986) the Board found that a conversation between union observer and employees did not constitute a "distraction" sufficient to set aside an election.

The Hearing Officer finds that Ms. Reeves did not engage in any impermissible conduct that would be Objectionable and recommends to the Regional Director that Objection 4 be overruled.

OBJECTION 6 - UNIT A AND UNIT B

(6) The Employer, through its agents, engaged in surveillance of employee Section 7 activity by photographing said activity, which has a tendency to coerce employees in the exercise of said activity and thereby prejudicing Petitioners.

Local 106 contends that Stan Hegener, President of I.M.T.C. engaged in surveillance by videotaping union representative and employees on February 8, 1990 as they were engaged in protected concerted activity (electioneer-

ing) on a public highway one third of a mile from the polling area.

Hegener testified that he did videotape Local 106 union representative and its supporters on February 8, 1990 as they were electioneering away from the polls. The videotape was offered and received into evidence as Employer Exhibit 33.

The Board in *Blanchard Construction Co.*, 234 NLRB 1035 (1978) held that photographing employees who are engaged in activities in behalf a union, tends to inhibit employees in their communication to the union representative and creates and interferes with, restrains, and coerces employees in the exercise of their Section 7 rights. See also *15th Avenue Iron Works*, 278 NLRB 643.

In this situation the employer's videotaping of the union representative and its supporters interfered with employees Section 7 rights and would additionally interfere with the election and its results.

The Hearing Officer finds that the Employer engaged in Objectionable conduct by videotaping employees as they were engaged in protected concerted activity.

The Hearing Officer recommends to the Regional Director that Objection 6 in Unit A and Unit B be sustained as objectionable conduct warranting the election conducted in Unit A and Unit B to be set aside.

OBJECTION 7 - UNIT A AND UNIT B

7. The Employer, through its agents, selected for layoff employees who were known supporters of Petitioners, which conduct tended to coerce employees and in-

terfere with the election process, and thereby prejudiced Petitioners.

Local 106 and Local 406 contend that the Employer layed off employees Gary Fee, James Taylor, Russell C. Ross, Jr., Gary M. Bordelon, Frank L. Boudreaux, C. R. Franks, A. D. Givens, Michael Mathews and Gil Sonnier because they were known union supporters, and such conduct coerced employees and interfered with the election process.

The Employer, on the other hand, contends that the above employees were layed off in a reduction in force and was not for any discriminatory reasons. The Employer additionally contends that this is not the proper forum for this objection.

In *Texas Meat Packers, Inc.*, 130 NLRB 279, and *Fibreboard, Corp.*, 283 NLRB No. 167, the Board found that a representation proceeding is not the proper forum for an allegation or contention that employees have been layed off because of their union activities. The gravamen of this decision is that the layoff of employees constitutes an unfair labor practice. This requires a finding before an Administrative Law Judge or the Board that the employer's conduct was violative of Section 8(a) (3) of the Act.

The record discloses that an unfair labor practice has not been filed over the above employees' layoff. Inasmuch as this is a representation proceeding, this is not the proper forum for raising such a matter, as there exists no complaint allegations that these employees were unlawfully layed off.

Under these circumstances, the Hearing Officer recommends that Objection 7 be overruled.

OBJECTION 8 - UNIT A AND UNIT B

8. By this and other conduct, the Employer through its agents interfered with the desired laboratory conditions of the election process and thereby prejudiced Petitioners.

Local 406 and Local 106 contend that the Employer implemented on December 11, 1989, a pay raise to employees during the critical period, interfering with the election.

The Employer, on the other hand, contends that the pay raise is not objectionable conduct.

Stan Hegener, President of I.M.T.C. testified that on November 27, 1989 prior to the filing of the petition, he wrote a letter to Jim Buxton, the Project Manager for Conoco concerning their deliberations in early November 1989 for wage changes. In the letter Hegener told Buxton that a pay increase would be implemented on December 11, 1989. Jim Buxton wrote to Stan Hegener on November 28, 1989 approving the changes outlined in Hegener's letter of November 27, 1989. This pay increase was implemented company wide on December 11, 1989. Local 106 filed a representation petition on December 1, 1989 and Local 406 filed a representation petition on December 15, 1989.

In *Pick Your Part Auto Wreckers, Inc.*, 294 NLRB No. 32, the Board found that announcing a wage increase based on longevity and implementing the wage increase after the filing of the union's petition is not objectionable where the schedule for raises were decided upon prior to the petition being filed.

Under these circumstances, the Hearing Officer

finds that the wage increases were decided by the employer prior to the petition being filed and were implemented after the filing of Local 106's petition and before the filing of Local 406's petition.

The Hearing Officer recommends to the Regional Director that Objection 8 be overruled.

RECOMMENDATION

Based upon the above and foregoing findings, the Hearing Officer recommends to the Regional Director that the challenge to the ballots of the following employees are:

UNIT A

Sustained (ineligible voters)

W. R. Burns, J. R. Citizen, A. J. Reeves, M. J. Reeves, M. A. Williams, Phillip Broussard, Mark Khoury, Jeff Hunsecker, Aubrey Smith, J. A. Sonnier, James Venable, Cliff Doucet, B. M. Fontenot, C. J. Fontenot, G. R. Fontenot, M. D. Fontenot, G. E. Whatley, J. A. Buller, R. J. Bushnell, G. Citizen, M. Collins, W. J. Clophus, J. B. Fontenot, I. T. Greene, E. P. Guillory, J. J. Guillory, L. P. Guillory, M. Guillory, D. L. Reed, W. Wooldridge, Kirk Alexander, John Blake, David Butts, Gerald Butts, Charles Courtney, Thomas Garrison, William Hebert, Randy Smith, Billy J. Sonnier, Edgar Sonnier, Manson Pitre, Chad Richmond and O. Guillory.

Overruled (eligible voters)

B. R. Demeritt, J. C. Matney, Russell C. Ross, James Taylor, J. P. Areno III, N. A. Doucet, Gary Fee, A. D. Givens and Michael Mathews.

UNIT B

Sustained (ineligible voters)

B. R. Demeritt, J. C. Matney, A. J. Reeves, M. J. Reeves, M. A. Williams, Terry Gaskin, J. C. Fruge, James Gaskin, Leroy Jackson, and R. Livingston.

Overruled (eligible voters)

W. R. Burns, J. R. Citizen and A. Petry.

The Hearing Officer recommends to the Regional Director that Employer's request for withdrawal of Objections Nos. 3, 6, 7, 8, and 10 in Unit A, Employer's request for withdrawal of Objections Nos. 1, 2(a), 4, and 5 in Unit B, and Local 106 and Local 406 requests for withdrawal of Objections Nos. 1, 2, and 5 be approved.

The Hearing Officer further recommends to the Regional Director that Employer's Objections Nos. 1(A), (b) (c), 2, 4, 5, 9, 11 and 12 in Unit A and Employer's Objections No. 3 and 6 in Unit B be overruled.

The Hearing officer further recommends to the Regional Director that Local 106 and Local 406 consolidated Objections Nos. 3, 4, 7, 8 be overruled and Objection No. 6 be sustained as objectionable conduct warranting the election conducted in Unit A and Unit B to be set aside.

Inasmuch as the Hearing Officer found that certain employees challenges listed above in Unit A and Unit B are ineligible voters, the remaining challenges are no longer determinative of the results of the election in Unit A and Unit B. Furthermore, inasmuch as the Hearing Officer found that Local 106 and Local 406 Objection No. 6 be

sustained, and if the findings herein of the Hearing Officer are adopted by the Regional Director and the Board, it would not effectuate the purpose of the Act to set aside the election in Unit A and Unit B and conduct a re-run election based upon the majority of the votes cast for Local 106 in Unit A and Local 406 in Unit B. Accordingly, the Hearing Officer recommends to the Regional Director that Certification of Representative issue to Local 106 in Unit A and to Local 406 in Unit B.

Additionally, should the Regional Director and his Supplemental Decision and/or the Board pursuant to a request for review, disagree with the Hearing Officer's findings and recommendations concerning the disposition of the determinative challenges and objections in Unit A and Unit B, the Hearing Officer recommends that if the determinative challenges disclose that a majority of votes cast are against Local 106 and Local 406, it is recommended that the election in both Unit A and Unit B be set aside based upon the Employer's conduct in Objection No. 6 and a re-run election be held. If however, the determinative challenges disclose that a majority of votes have been cast for Local 106 and Local 406, it is recommended that Certification of Representative issue to Local 106 in Unit A and to Local 406 in Unit B.

FILING OF EXCEPTIONS

Within 14 days from the date of this report, any party may file with the Regional Director, Region 15 in New Orleans, Louisiana, an original and seven copies of exceptions in accordance with Section 102.69(b) of the Rules and Regulations, Series 8, as amended. Immediately upon the filing of such exceptions, the party filing same shall serve a copy of it on the other parties and a statement of service with the Regional Director. If no exceptions are filed to this

report, the Regional Director may then adopt the recommendations of the Hearing Officer.

Dated at San Antonio, Texas this 24th day of May, 1990.

/s/ Ruben R. Armendariz

Ruben R. Armendariz, Hearing Officer
National Labor Relations Board
Region 16
727 East Durango, Room A-509
San Antonio, Texas 78206

APPENDIX E

NOT INCLUDED IN BOUND VOLUMES

CDO
San Antonio, TX

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

FILED
FEB 22 '91

I. M. T. C., INC.
Employer

and

Case
15-RC-7492

PLUMBERS AND STEAMFITTERS LOCAL 106, A/W UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF NORTH AMERICA AND CANADA
Petitioner

and

I. M. T. C., INC.
Employer

and

Case
15-RC-7497

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406, AFL-CIO
Petitioner

E-2

DECISION AND CERTIFICATIONS OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to, and determinative challenges in, an election held February 8, 1990, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on January 12, 1990. The tally of ballots for Unit A (Case 15-RC-7492) shows 55 for and 30 against the Petitioner, with 52 challenged ballots, a sufficient number to affect the results. The tally of ballots for Unit B (Case 15-RC-7497) shows 8 for and 2 against the Petitioner, with 10 challenged ballots, a sufficient number to affect the results.

The Board has review the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that a certification of representative should be issued in each case.

---

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions we adopt pro forma the hearing officer's recommendation that the challenges to the ballots of employees James Venable and Chad Richmond be sustained in Unit A, that the challenges to the ballots of employees Terry Gaskin, J.C. Fruge, James T. Gaskin, and R. Livingston be sustained in Unit B; that the Union's objections 3, 4, 7, and 8 be overruled; that the Employer's request for withdrawal of its Objections 3, 6, 7, 8, and 10 in Unit A and for withdrawal of its Objections 1, 2(a), 4, and 5 in Unit B be approved; and that the Union's request for withdrawal of its Objections 1, 2, and 5 be approved.

We find it unnecessary to pass on the hearing officer's sustaining of the challenges to the ballots of W. R. Burns and J.R. Citizen in Unit

CERTIFICATIONS OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots in Case 15-RC-7492 have been cast for Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

IT IS FURTHER CERTIFIED that a majority of the valid ballots in Case 15-RC-7497 have been cast for International Union of Operating Engineers Local 406, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional

---

(footnote 2 continued)

A, and B.R. Demeritt and J.C. Matney in Unit B, since, in light of the resolution of the other challenged ballots, the ballots of these voters in the units in question are not sufficient in number to affect the results in either unit.

Having adopted the hearing officer's recommendations regarding the remaining challenged ballots, we find it unnecessary to pass on the merits of the Union's Objection 6 regarding alleged surveillance of a union demonstration.

employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., **February 20, 1991.**

_____

Mary Miller Cracraft, Member

_____

Dennis M. Devaney, Member

_____

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX F

303 NLRB No. 54

CDO
D--2054
Lake Charles, LA

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

I. M. T. C., INC.

and

Case
15--CA--11472

PLUMBERS AND STEAMFITTERS LOCAL 106, A/W UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF NORTH AMERICA AND CANADA, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406, AFL-CIO

DECISION AND ORDER

On March 22, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Unions' requests to bargain following the Unions' certification in Cases 15--RC--7492 and 15--RC--7497. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The

Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On May 9, 1991, the General Counsel filed a Motion for Summary Judgment. On May 15, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response on May 20, 1991.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and brief to the Board, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination, the Respondent's objections to the election, and the Board's disposition of certain challenged ballots in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant

[1] The Respondent also filed an "Opposition to Motion for Summary Judgment" on May 29, 1991, in which it reiterates the arguments made in its May 20, 1991 response to the Notice to Show Cause.

the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a Louisiana corporation with places of business in and around Lake Charles, Louisiana, is an industrial, general contractor providing mechanical and civil contracting services in the construction industry. During the 12-month period ending February 28, 1991, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received at its Louisiana jobsites products, goods, and materials valued in excess of $50,000 directly from points and places located outside the State of Louisiana. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held on February 8, 1990, the Unions were certified on February 20, 1991, as the collective-bargaining representatives of the Respondent's employees in separate appropriate units. In Case 15--RC--7492, Plumbers and Steamfitters Local 106 was certified as the bargaining representative of employees in the following unit:

> All pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and

> around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

In Case 15--RC--7497, International Union of Operating Engineers Local 406, AFL--CIO, was certified as the bargaining representative of employees in the following unit:

> All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Unions continue to be the exclusive representatives under Section 9(a) of the Act.

B. *Refusals to Bargain*

Since on or about February 22, 1991, the Unions have requested the Respondent to bargain and, since on or about February 27, 1991, the Respondent has refused. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after February 27, 1991, to bargain with the Unions as the exclusive collective-bargaining representatives of employees in the appropriate units, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Unions, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the service of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, I.M.T.C., Inc., Westlake, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada, AFL--CIO, and with International Union of Operating Engineers Local 406, AFL--CIO, respectively, as the exclusive bargaining representatives of the employees in the separate bargaining units set forth below.

(b) In any like or related manner interfering with,

restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada, AFL--CIO, as the exclusive representative of the employees in the following appropriate unit described as Unit A, and with International Union of Operating Engineers Local 406, AFL--CIO, as the exclusive representative of the employees in the following appropriate unit described as Unit B, concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

Unit A

All pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Unit B

All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facilities at Lake Charles, Louisiana,

copies of the attached notice marked "Apendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., June 11, 1991.

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada, AFL--CIO, and with International Union of Operating Engineers Local 406, AFL--CIO, respectively, as the exclusive representatives of the employees in the separate bargaining units set forth below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Plumbers and Steamfitters Local 106 concerning employees in the bargaining unit described below as Unit A, and with International Union of Operating Engineers Local 406 concerning employees in the bargaining unit described below as Unit B, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining units:

Unit A
All pipefitters, pipewelders and pipehelpers

employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Unit B

All operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

I.M.T.C., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1515 Poydras Street, Room 610, New Orleans, Louisiana 70112-3723, Telephone 504—589—6389.

N0. 92-1475

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

I.M.T.C., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority by deviating from established precedent when it ordered Petitioner to hold craft specific elections, where the employer utilizes its employees without regard to craft lines and the petitioned-for bargaining units do not constitute clearly identifiable and functionally distinct groups of employees.

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BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc. (herein "ABC") is a national trade association representing approximately 16,000 construction and construction related firms located in 79 chapters throughout the country, including the Petitioner. ABC's diverse membership is bound by a shared commitment to the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. An integral part of that philosophy is the rejection of organizing a workforce along strict craft jurisdictional lines. Rather, our members share the belief that the freedom to assign employees across traditional craft

lines, as dictated by the needs of a particular job, is essential to the efficient delivery of construction services. Indeed, this is one of the distinguishing features of the "merit shop" approach.

Consistent with this philosophy, ABC provides its members access to a training program, in order to diversify the skills of their employees. Although the training program is divided into different skill areas for the sake of practical and organizational convenience, this is no way implies an endorsement of the traditional craft distinctions in job assignments. Rather one of the purposes of the training program is precisely the opposite — to enable employees to cross-train in areas other than their dominant skill. As such, the purpose of the training program is entirely consistent with the philosophy of utilizing employees without regard to craft distinctions as the most efficient means to complete a construction project.

STATEMENT OF THE CASE

ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A. The Board's Unit Determination, As Enforced By The Court Of Appeals, Is At Odds With Established Board Precedent And Represents A Radical Departure From Its Previous Policy.

The law is well-settled that where the Board departs from established precedent, but fails to provide a reasonable explanation for the departure, it is not given the traditional deference in making unit determinations and, in such cases, the Board's order will not be enforced. *See, e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-97 (1941); *Amoco Productions Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980). In the present case, the Board has failed to adequately explain why it ordered separate craft elec-

tions, in contrast to its own clear past precedent, where a construction employer's employees share common supervision and work assignments, receive identical rates of pay, have daily contact across craft lines, work side by side, and enjoy identical fringe benefits and training. While the Board has long recognized that in the construction industry units may be appropriate on the basis of craft, or because they comprise a clearly identifiable and functionally distinct group of employees, the petitioned-for employees in this case meet neither of these tests. Consequently, the Board's decision in this case was not supported by substantial evidence in light of the controlling legal principles and the Court of Appeal's enforcement of that order was, therefore, clearly erroneous.

The facts of the present case are nearly identical to those found in *Brown and Root, Inc.*, 258 NLRB 1002 (1981), in which the union attempted to carve out a "craft" unit consisting of pipefitters, pipe welders, boilermakers, boiler welders, pipefitter helpers and boilermaker helpers from the employer's overall construction workforce. The Board determined that these classifications of workers did not have a sufficient community of interest distinct from the other construction workers so as to merit a separate bargaining unit. Instead, the Board accepted the employer's position that its operation was integrated to the extent that one overall unit was appropriate for collective bargaining purposes.

The Board reached this decision by analyzing the traditional "community of interest" criteria to determine that an overall unit was appropriate, rather than a unit consisting of a few classifications artificially carved out from the overall workforce. The Board noted, *inter alia*, that all the employees were paid on an hourly basis and were eligible for identical fringe benefits. Further, all employees were covered by the same work and safety rules. Moreover, all employees were eligible for upgrading or cross-training programs, although they did not receive

journeyman status in a particular craft.[1] Finally, the Board determined in *Brown & Root* that the union's requested unit was inappropriate due to the employer's use of composite crews, which included individuals with pipefitter skills working on crews which included crane operators, riggers, structural ironworkers and helpers, who were not limited to assisting only pipefitters and boilermakers.

Of particular importance was the testimony of the employer's vice-president, who explained that while job classifications such as "pipefitter" and "boilermaker" were used to distinguish employees, the employer did not strictly follow such traditional jurisdictional lines when assigning work. Rather, the testimony established, as in the instant case, that employees in various job classifications worked together to do whatever was necessary to complete a particular project. As the Board stated, "the Employer assigns and utilizes its employees according to its needs rather than following strict jurisdictional or craft lines." *Id.* at 1003.[2]

Thus, in *Brown & Root*, the Board considered and rejected the union's argument on facts nearly identical to those of the present case. The union's position was rejected even though the employer had organized its workforce into departments which

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[1] This is very similar to Petitioner's participation in ABC's training program. In this regard, the testimony is uncontradicted that the training provided by the ABC program was designed to allow Petitioner's employees to acquire skills in order to function in any number of classifications. In addition, as in the instant case, the employer in *Brown & Root* administered welding tests to its employees without regard to job classification.

[2] In *Brown & Root*, the Board also noted that the requested unit included helpers assigned to pipefitters and boilermakers. The Board commented that it would be inappropriate to create such a unit where helpers were not assigned by craft, but were available to all skilled workers. This is precisely the situation in the present case. All of Petitioner's helpers are part of the composite crews and are expected to assist all of the mechanics in moving a project to completion.

included a pipefitting department, a boilermaker department, a millwright department, etc. Moreover, individuals with different skills were further distinguished by wearing different colored hard hats (e.g., pipefitters wore green hard hats, while boilermakers wore gray hard hats). The Board looked beyond the surface appearance of distinct craft lines, however, and applied its traditional community of interest standard to determine that one overall unit was appropriate.

The holding in *Brown & Root* was reaffirmed in *Longcrier Co.*, 277 NLRB 570 (1985), in which the Board determined that a unit of operating engineers was inappropriate in a situation in which a composite crew method was utilized by an employer who also employed individuals classified as carpenters and laborers. The rationale of the decision was that the petitioned-for unit did not consist of a clearly identifiable and functionally distinct group of employees. The Board noted that the operators did not participate in, or complete, a traditional apprenticeship training program or achieve journeyman status in the operating engineer craft. The Board ruled that it would be inappropriate for a unit to be carved out to include only those employees "who happen to spend a majority of their time operating some type of construction equipment." *Id.* at 572.

The Board further noted that the more compelling factors which favored an overall bargaining unit included the common supervision under which all classifications of employees worked and the functional integration of the work performed by the operators, carpenters and laborers. Moreover, the crew supervisors utilized employees "according to need rather than following strict job classifications . . . [T]hose project employees who operate construction equipment also perform other tasks and work with other employees as an integrated team" *Id.*

For all these reasons, which are also present in the instant case, the Board determined that an overall unit was appropriate. *See also A.C. Pavement Stripping Co., Inc.*, 296 NLRB 206

(1989) (overall unit appropriate, despite several job classifications, where all employees worked under common supervision and performed tasks without regard to craft jurisdictional lines); *accord S.J. Groves & Sons Co.*, 267 NLRB 175 (1983).

Thus, because the Board's decision in this case is an unwarranted and unexplained departure from its established precedent regarding the appropriateness of unit determinations, the Fifth Circuit's decision to enforce the Board's order must be reversed.

B. The Board's Decision Threatens To Undermine The Stability of Multi-Craft Labor Relations In The Construction Industry.

Not only is the Board's decision in this case clearly contrary to its established precedent, as outlined above, but it also threatens, as Petitioner points out, to undermine the stability of labor relations on any project which utilizes employees across craft lines. Further, the decision will have a deleterious effect the NLRB electoral process throughout the construction industry.

It has been long recognized that the designation of artificially small bargaining units, which exclude employees with common skills, attitudes and economic interests may unnecessarily generate factionization and in-fighting among employees. *See NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980).[3] The potential for conflict will be compounded in this case, where the employer uses small, functionally integrated work crews, which will potentially be made up of both union and non-union employees, subject to different terms and conditions of employment.

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[3] Indeed, this is the rationale behind the "community of interest" standard, under which the Board and the courts have traditionally looked to factors such as "bargaining history, operational integration, geographic proximity, common supervision, similarity in job function and degree of employee interchange." *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977).

In this regard, the Board's reliance on the existence of the ABC training program to justify the imposition of craft- specific bargaining units is particularly inappropriate, as it ignores the reality of multi-craft training in the non-union sector of the construction industry. Far from supporting rigid craft lines, the purpose of ABC's training program, in part, is to encourage cross-craft diversity, which results in the more efficient delivery of construction services. One side effect of cross-craft training is that it militates in favor of a company-wide community of interests because it creates a more integrated and unified work force. The Board's decision in this case threatens to destroy the advantages of this approach to labor relations.

Further, the Board's decision to carve out craft specific units from within an integrated workforce will vastly complicate the electoral process where employees are utilized across craft lines, as demonstrated by the facts of this case. As Petitioner points out, given the fact that IMTC's employees perform a variety of craft skills, it was, and will be, be extremely burdensome to identify which unit is appropriate from each individual employee. In addition, there will inevitably arise jurisdictional disputes among competing unions. All of these factors will complicate the electoral process, to the detriment of employees and management alike.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Petition for Writ of Certiorari, ABC urges the Court to review the decision of the Fifth Circuit in this case.

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